90-1117

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Petitioners,

vs.

CARRIE MEEK, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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January, 1991

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QUESTIONS PRESENTED

I.

Whether On Cross-Motions For Summary Judgment Involving A Vote Dilution Challenge To Dade County's At-Large Election System Under Section 2 Of The Voting Rights Act, Where The Plaintiff Minority Groups Offered No Evidence That The Minority Groups Could Elect More Representatives Under A Single-Member Districting Scheme Or That The Current Minority Representatives Were Not The Preferred Candidates Of Their Respective Minority Groups, The Eleventh Circuit Court of Appeals' Decision Conflicts With The Decisions Of This Court Applicable To A Motion For Summary Judgment By Imposing Upon The Defendant-County The Burden To Negate The Existence Of Any Genuine Issue Of Material Fact?

II.

Whether The Eleventh Circuit's Decision Properly Interpreted Section 2 Of The Voting Rights Act By Holding That Plaintiff-Minority Groups, Who Constitute A Present And Increasing Majority Of The County's Registered Voters, Are Entitled To Pursue A Judicial Remedy Under Section 2, Despite The Conceded Existence Of A Viable, Unimpeded Political Alternative For Changing The Challenged Electoral System By Referendum?

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No. _____

In The

Supreme Court of the United States

October Term, 1990

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Petitioners,[1]

vs.

CARRIE MEEK, et al.,

Respondents.[2]

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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[1] The other petitioners are the Dade County Board of County Commissioners, Honorable Stephen Clark, Mayor, Honorable Harvey Ruvin, Commissioner, Honorable Sherman Winn, Commissioner, Honorable Larry Hawkins, Commissioner, Honorable Joseph Gersten, Commissioner, Honorable Charles Dusseau, Commissioner, Honorable Arthur Teele, Commissioner, Honorable Jorge Penelas, Commissioner, Honorable Mary Collins, Commissioner, Metro-Dade County Canvassing Board and David Leahy, Supervisor of Elections. Petitioners will be referred to collectively as the "County".

[2] The other respondents are the Honorable James C. Burke, Honorable Xavier Suarez, Ralph Parkingham, Maurice

(Continued on following page)

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceedings on October 16, 1990.

OPINIONS BELOW

The October 16, 1990 order of the Court of Appeals for the Eleventh Circuit denying petitioners' Petition For Rehearing And Suggestion Of Rehearing En Banc has not been reported. It is reprinted in the appendix hereto.

The August 17, 1990 opinion of the United States Court of Appeals for the Eleventh Circuit reversing the United States District Court for the Southern District of Florida's final summary judgment in favor of petitioners is reported at 908 F.2d 1540. It is reprinted in the appendix hereto.

The October 5, 1988 memorandum decision of the United States District Court for the Southern District of Florida denying respondents' motion for summary judgment and entering final summary judgment in favor of petitioners has not been reported. It is reprinted in the appendix hereto.

The November 6, 1988 memorandum decision of the United States District Court for the Southern District of

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(Continued from previous page)

Ferre, Pedro Jose Gonzalez, Prisciliano Falcon, Orlando Orra and the Honorable Victor DeYurre.

Florida denying respondents' motion to alter summary judgment has not been reported. It is reprinted in the appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1973, the respondents brought this suit in the Southern District of Florida. On October 5, 1988 the Southern District granted petitioners' motion for summary judgment and denied respondents' motion for summary judgment.

On respondents' appeal, the Eleventh Circuit on August 17, 1990 entered a judgment and opinion reversing the Southern District's order. On October 16, 1990 the Eleventh Circuit entered its Order Denying Petitioners' Petition For Rehearing And Suggestion of Rehearing En Banc. This petition was filed within ninety days of that date.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

42 U.S.C. §1973. *Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation*

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political

subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Fed.R.Civ.P. 56 Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought

may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge,

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Respondents, black and Hispanic citizens of Dade County, Florida, brought this suit as two distinct groups alleging that the current at-large system used to elect the Dade County Commission violated Section 2 of the Voting Rights Act. (R.1-1-9 to 10).[3] The United States District Court exercised jurisdiction pursuant to 28 U.S.C. §1331. Respondents alleged that the County's black citizens, Hispanic citizens and non-Hispanic white citizens were three distinct politically cohesive groups and that the at-large system prevented (1) the county's black citizens from electing candidates of their choice and (2) the county's Hispanic citizens from electing candidates of their choice. (R.1-1-9 to 10, 5-1-4 to 5).

On November 12, 1987, after more than a year for discovery, Metropolitan Dade County filed a motion for summary judgment with attached affidavits and a memorandum of law. (R.1-50, 1-51). The affidavits submitted by the County established that Metropolitan Dade County is divided into eight residential districts, and that the County Commission is comprised of one person from each district elected at-large plus a mayor who can reside in any of the districts and is elected at-large. (R.1-50-2 to 5). The affidavit further established that of the current eight districts one had a black majority and one an Hispanic majority, that otherwise blacks and Hispanics were dispersed throughout the County, that the black majority district has had a black Commissioner continuously for more than twenty years and the Hispanic majority district

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[3] This is not a class action lawsuit.

has had an Hispanic Commissioner continuously since 1982. (R.1-50-2, R.1-51-6, R.3-93 to 96). The affidavit also established that in the past 30 years no black candidate and only a single Hispanic candidate has ever prevailed in his or her district but lost countywide. (R.1-51-2 to 5).

Respondents requested and were granted until December 25, 1987 to respond to the motion for summary judgment. They filed a response on December 31, 1987, which contained no supporting evidentiary materials, and simply argued, in sum, that summary judgment was inappropriate because the County had failed to meet its burden under Fed.R.Civ.P. 56 "by failing to demonstrate that by the affidavits, admissions and depositions that there is not genuine issue of material fact in contention." (R.1-62). The County responded that it had no such burden, that it had pointed out that Respondents had failed to present any evidence that more than one black majority single-member district and one Hispanic majority single-member district could be created in the County. Accordingly, the County asserted that since respondents had not raised a genuine issue of material fact as to the existence of prong one of the three-prong test established in *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S.Ct. 2751, 2766 (1986), the County was entitled to summary judgment. (R.2-72).

Respondents later filed their own motion for summary judgment and affidavits of Genie Stowers. (R.2-77). However, the motion and affidavits only discussed the issue of racially polarized voting; they in no way discussed whether blacks or Hispanics were sufficiently large and geographically compact to constitute a majority in more than the one district each in which they currently

constituted a majority and from which a black and Hispanic had been elected respectively. (R.2-77, 78, 80). The affidavits offered no evidence that the current black commissioner and Hispanic commissioner were not the preferred candidate of the black citizens of the County or the Hispanic citizens of the County respectively. (R.2-80).

Two hearings were held on the cross-motions for summary judgment. At neither hearing did respondents submit a map, a proposed redistricting plan, or any evidence that the current black commissioner and Hispanic commissioner were not the preferred representative of the black and Hispanic community respectively. (R. 4-82, 5-90). In sum, respondents submitted absolutely no evidentiary materials that addressed the first *Gingles* prong.

Finally, prior to the final hearing on the cross-motions for summary judgment the County submitted evidence, which was undisputed by respondents, that showed that 32.96% of the registered voters of the County were Hispanic and 18.37% of the registered voters of the County were black. (R.2-89, 90). Likewise it was undisputed that, pursuant to sections 7.01 and 8.07 of the Dade County Home Rule Charter, any majority of voters in the County can via referendum change the electoral system from at-large to single-member districts. (R.1-50).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision reversing the summary judgment entered in favor of the County improperly placed a burden on the County to negate respondents' claim in direct conflict with this Court's 1986 trilogy of cases construing Fed.R.Civ.P. 56.

In *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); this Court explained how a district court is to review a motion for summary judgment made pursuant to Fed.R.Civ.P. 56. The Eleventh Circuit's decision is not only in conflict with these three decisions, but in fact it turned them on their head by placing a burden on the County to negate the existence of a genuine issue of material fact as to an essential element of respondents' case upon which respondents had the burden of proof.

To prevail in a lawsuit brought pursuant to Section 2 of the Voting Rights Act, at a minimum the minority group must prove by the preponderance of the evidence that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "it is politically cohesive," and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2751, 2766-67 (1986). The first *Gingles* factor was established in the context of a situation where no minority candidate had been elected in a multi-member district; where a minority group has been able to elect "one minority representative [to prevail

on a Section 2 claim] the plaintiffs would have to establish that under a single-member district structure the minority would be able to elect more representatives." *Solomon v. Liberty County, Florida*, 865 F.2d 1566, 1572 n. 5 (11th Cir. 1988) (vacated but held to be proper by five members of ten member en banc court, *Soloman v. Liberty County, Florida*, 899 F.2d 1012, 1037 (Tjoflat, C.J. specially concurring).[4]

When the County moved for summary judgment on the ground that respondents had not raised a genuine issue of material fact as to the *Gingles* prong one requirement, a matter upon which the County did not have the ultimate burden of proof at trial, its burden was a minimal one. The County was simply required to inform the district court of the basis for its motion and identify the pleadings, affidavits and other evidentiary materials on file which demonstrated the absence of a genuine issue of material fact. *Celotex Corporation*, 477 U.S. at 323, 106 S.Ct. at 2553. Rule 56 does not require a moving party to come forward with materials which negate an opponent's

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[4] The decision of the Eleventh Circuit in this case, which was written by two judges who did not concur with Chief Judge Tjoflat in *Solomon*, agreed with his position that to establish prong one of *Gingles* a minority group must establish that they can elect more candidates of their choice under a single member district structure than under the current system. *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1547 (11th Cir. 1990). Thus, a majority of the Eleventh Circuit has now agreed with the rather obvious conclusion set forth in footnote five of the now vacated decision in *Solomon*. This, of course, comports with the *Gingles* Court's reasons for establishing the prong one requirement. *Gingles*, 478 U.S. at 50, n.17, 106 S.Ct. at 2766, n.17.

claim. *Id.* Rather, the "burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* 477 U.S. at 325, 106 S.Ct. at 2554.

Once a defendant points out that there is an absence of evidence to support the plaintiff's case, the plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Company, Ltd.*, 475 U.S. at 586, 106 S.Ct. at 1356, Moreover, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable [factfinder] could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The plaintiff must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56 (e); *accord Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511; *Matsushita Electric Industrial Company, Ltd.*, 475 U.S. at 587, 106 S.Ct. at 1356. Where the plaintiff does not meet its significant burden, Rule "56 (c) mandates the entry of summary judgment. . . . " *Celotex Corporation*, 477 U.S. at 322, 106 S.Ct. at 2552.

Over a year after the complaint in this case had been filed the County filed a motion for summary judgment which was supported by an affidavit which pointed out that with a single-member district plan only one black majority single-member district and only one Hispanic majority single-member district could be created, and therefore respondents could achieve no better minority representation under a single-member district plan than

under the existing at-large structure. The County's evidentiary materials further pointed out that all black candidates who had been preferred by the black voters of the black majority residency district had gone on to be elected countywide and all Hispanic candidates, except one, who had been preferred by the Hispanic voters of the Hispanic majority residency district had gone on to be elected countywide.

Critically, this is not a case where in response to the County's motion for summary judgment and evidentiary materials the respondents came forward with something relating to prong one of *Gingles* that arguably was insufficient; rather this is a case where respondents came forward with *absolutely nothing* that related to prong one. Respondents *never* submitted a proposed redistricting plan that they believed would achieve better minority representation. Respondents *never* submitted any evidence that more than one black majority district and one Hispanic majority district could be created under the existing district scheme. Finally, respondents *never* submitted any evidence that the black and Hispanic citizens who had been elected to the County Commission were not the preferred candidate of the black citizens and Hispanic citizens of the County, respectively.

Because the County had pointed out by evidentiary materials that no genuine issue of material fact existed as to prong one of *Gingles*, because prong one was an essential element of respondents' case, and because respondents offered absolutely no evidentiary materials whatsoever that addressed prong one, summary judgment was properly entered in Dade County's favor. The decision of the Eleventh Circuit reversed the summary

judgment because "the county assumes that no other districts could be drawn that would permit Blacks or Hispanics to elect more representatives than they do now," and possibly that assumption is incorrect, and because "the county assumes that the Hispanic and Black representatives elected from districts two and three are the 'preferred representatives' of the respective minorities," and possibly that assumption is incorrect. *Meek*, 908 F.2d at 1547-48. With all due respect, the County did not assume anything. To the contrary, as is its right pursuant to Rule 56, Dade County submitted a motion supported with evidentiary materials which pointed out that respondents could not establish prong one of *Gingles*.

If any assumptions were improperly made, they were made by the respondents. It is the respondents who have assumed without evidentiary support that the black and Hispanic candidates who have been elected to the County Commission are not preferred by black and Hispanic voters respectively. Similarly, it is the respondents who have assumed without proof that some unidentified districting scheme might result in the election of more minority candidates than the existing system. When faced with a motion for summary judgment, respondents had to do more than simply show there was some metaphysical doubt as to the material facts; they had to come forward with specific facts showing that there was a genuine issue for trial. Respondents came forward with absolutely nothing. Accordingly, the summary judgment entered by the district court should have been affirmed.

This Court should grant the petition for writ of certiorari because by reversing the District Court, the Eleventh Circuit acted in direct conflict with this Court's

explicit holdings in *Matsushita Electric Industrial Company, Ltd.*, *Anderson* and *Celotex Corporation*. In fact, despite this Court's clear language to the contrary in *Celotex Corporation*, the Eleventh Circuit required the County to negate respondents' claim. At the heart of Rule 56 and this Court's decisions construing it, is the concept that a plaintiff cannot defeat a motion for summary judgment which points out the non-existence of a genuine issue of material fact by an attorney's speculation that his client may be able to come forward with evidence raising a genuine issue of material fact. Rather, the party must come forward with the evidence. The Eleventh Circuit ignored respondents' burden, which this Court went to great lengths to spell out in its 1986 trilogy of cases. A defendant has a right to have summary judgment entered in its favor when it complies with Rule 56 and a plaintiff offers nothing in response. This Court should grant the petition for writ of certiorari to reverse the Eleventh Circuit's decision which is in conflict with *Matsushita Electric Industrial Company, Ltd.*, *Anderson* and *Celotex Corporation*.[5]

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[5] The Eleventh Circuit's decision also conflicts with *McNeil v. Springfield Park District*, 851 F.2d 937, 940-43 (7th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct., 1769 (1989), which held that if a plaintiff fails to come forward with evidentiary materials which raise a genuine issue of material fact as to all three of the *Gingles* necessary preconditions, then the defendant is entitled to a final summary judgment.

II. The Eleventh Circuit's ruling that a Section 2 violation can be established even where it is undisputed that the plaintiffs constitute a majority of the registered voters and the electoral structure can be changed by a majority of the voters is not a correct interpretation of Section 2 and should be reviewed.

The respondents have never disputed that together they constitute a majority of the registered voters in Dade County and as such are possessed of the unimpeded political ability to change the challenged electoral system via the referendum method provided in the Dade County Home Rule Charter. While there was evidence that black citizens and Hispanic citizens were hostile to one another in elections involving black or Hispanic candidates, it has been undisputed that they are united on the issue of what electoral structure they desire – as is evidenced by this lawsuit. Accordingly, the Eleventh Circuit expressly assumed that the County's referendum method was a viable alternative political avenue available to the plaintiffs. *Meek*, 908 F.2d at 1548-9. Nevertheless, the Eleventh Circuit held, without citation to any supporting authority, that "Regardless of the viability of alternative avenues, the plaintiffs are entitled to enjoy their statutory right to seek redress in the federal courts, and we cannot deny it to them." *Id.* While this may be a correct statement in many statutory contexts, it is not where a Section 2 claim is concerned. The very essence of Section 2 is the provision of a judicial remedy due to the lack of opportunity to effect change through participation in the political process. Where there exists the opportunity to effect the desired change through participation in available political processes, the allowance of a Section 2 claim serves only to usurp the political process by the judicial process.

Section 2 expressly states that it does not provide a right for proportional representation, but rather it provides a cause of action where members of a protected minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973 (b); *accord Gingles*, 478 U.S. at 46, 106 S.Ct. at 2764. As such, a cause of action under Section 2 and the availability of a judicial remedy is expressly conditioned upon the minority group's lack of opportunity to effect such change through the political process. This Court's holding that the judiciary should defer to legislative plans submitted during the remedy stage of a Section 2 action, *Wise v. Liscomb*, 437 U.S. 535, 540, 98 S.Ct. 2493, 2497 (1978), further supports the conclusion that Section 2 is not violated and judicial intervention is not warranted where the challenged electoral system provides a mechanism for change of which the complaining parties have a full opportunity to avail themselves.

Given the undisputed viability of the Dade County Home Rule Charter's referendum method there simply can be no question that the black and Hispanic citizens of Metropolitan Dade County have an opportunity equal to, if not greater than, that of other members of the electorate, to effect change through the political process. In sum, Section 2 of the Voting Rights Act applies only to situations involving a minority group's lack of opportunity to effect change through participation in the political process. *Gingles*, 478 U.S. at 46, 106 S.Ct. at 2764. Pursuant to the referendum method provided in the Dade County Home Rule Charter respondents have equal access to the political process. The Eleventh Circuit's

decision to the contrary should be reviewed and reversed.

CONCLUSION

For these two reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Carrie MEEK, et al.,
Plaintiffs-Appellants,

v.

METROPOLITAN DADE COUNTY, et al.,
Defendants-Appellees.

No. 89-5146.

United States Court of Appeals,
Eleventh Circuit.

Aug. 17, 1990.

Various black and Hispanic citizens and registered voters of county brought suit against county alleging that "at-large" scheme for election to board of county commissioners violated Voting Rights Act by diluting their voting strength. The United States District Court for the Southern District of Florida, No. 86-1820-CIV-KLR, Kenneth L. Ryskamp, J., entered judgment for county, and appeal was taken. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) trial court erroneously determined that non-Latin white voters could not constitute a voting bloc sufficient to bar election of black candidates, without giving effect to the coalition between Hispanics and non-Latin whites which frequently formed to bar election of blacks; (2) trial court erred in asserting that Hispanics could not challenge "at-large" method of election because they had numerical majority of voters and could elect their candidates by increasing the percentage of registration; and (3) trial court erroneously determined that minority classes would be unable to elect more representatives under single-member district plan than under at-large scheme, as each group had a majority in only one of

eight residence districts from which members were currently selected at large, and each minority group was currently represented in one district.

Reversed and remanded.

Stephen M. Cody, Miami, Fla., for plaintiffs-appellants.

Murray A. Greenberg, Robert A. Duvall, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

KRAVITCH, Circuit Judge:

Carrie Meek and other plaintiffs appeal from the district court's grant of summary judgment in favor of Metropolitan Dade County, Florida ("the county"). The district court held that the plaintiffs failed to establish certain required elements of their vote dilution case, and therefore granted summary judgment for the defendants and denied the plaintiffs' summary judgment motion. Because the district court erred in applying the law regarding vote dilution, we reverse and remand.

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*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

BACKGROUND

The plaintiffs, Black and Hispanic citizens and registered voters of Dade County, brought suit against the county alleging that the at-large scheme for the election of the Board of County Commissioners, which is the legislative and governing body of the county, violated section two of the Voting Rights Act by diluting Black and Hispanic voting strength.[1] Although the county has an ethnically diverse population, the three major groups, as identified by the parties and the district court, are: Blacks, Hispanics, and Non Latin Whites. None of the groups constitutes a majority of the total number of registered voters. As the district court noted: "Non Latin Whites comprises approximately 37 percent of the population and 48.67 percent of the registered voters; Hispanics (including Hispanics born in the United States) comprise approximately 43 percent of the population and 32.96 percent of the registered voters; and Blacks comprise approximately 20 percent of the population and 18.37 percent of the registered voters of Dade County." *Meek v. Metropolitan Dade County, Florida*, No. 86-1820, slip

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[1] The plaintiffs also alleged a constitutional claim arising under the fourteenth and fifteenth amendments to the Constitution. To prevail on such a claim plaintiffs must prove that the electoral system to which they object is conceived or operated with a discriminatory purpose. *See City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). The district court here, however, found that the plaintiffs had failed to present any evidence of a discriminatory purpose. They have not pressed their constitutional arguments on appeal, and accordingly we do not address them further.

op. at 15 (S.D.Fla. Oct. 5, 1988) [hereinafter Order of October 5, 1988].

The County electoral system for county commissioners is part of a so-called "federated plan" that provides for the allocation of authority between the county and the metropolitan governments. The county commission is composed of a mayor and eight commissioners. Although the mayor may live anywhere in the county, each of the commissioners must reside in a different one of the eight residence districts. Each commissioner, however, must run for election county-wide. Thus, although the county is divided into various residence districts, the elections are conducted at-large and county-wide.

The plaintiffs' vote dilution claim was brought under section two of the Voting Rights Act as amended in 1982.[2] The Supreme Court in *Thornburg v. Gingles* stated that:

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[2] Section two, as codified, reads as follows:

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section B(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown

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> [t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multi-member districts and at-large voting schemes may " 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' "

478 U.S. 30, 47, 106 S.Ct. 2752, 2764, 92 L.Ed.2d 25 (1986) (citation and footnote omitted) (interpolation in original). The Court further explicated the requirements a plaintiff must meet in pursuing a section two vote dilution claim:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must

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that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.

42 U.S.C. § 1973 (as amended 1982).

> be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Gingles, 478 U.S. at 50-51, 106 S.Ct. at 2766-67 (footnotes and citations omitted; emphasis in original).

The Court further explained the causation threshold of *Gingles* as follows:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to

elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

> "To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates. . . . [This standard] thus would only protect racial minority votes from diminution proximately caused by the district plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55-66 (footnotes omitted; emphasis added).

Gingles, 478 U.S. at 50, 106 S.Ct. at 2766 n. 17.

While the full contours of *Gingles* have not been agreed upon by this circuit, it is clear that the plaintiff must establish the three core *Gingles* factors in order to prevail on a vote dilution claim. *See Solomon v. Liberty County*, 899 F.2d 1012, 1017-21 (Kravitch, J., specially concurring), 899 F.2d at 1037 (Tjoflat, C.J., specially concurring (11th Cir.1990) (evenly divided en banc court).

The district court's order granting summary judgment in favor of the county held that the plaintiff's had not established that the Non Latin White bloc voting was "legally sufficient" because the plaintiffs had not proved "the existence of a Non Latin White bloc majority that usually defeats the election of the minority's preferred

candidate."[3] The district court reasoned that where Non Latin Whites did not constitute a majority, Non Latin White bloc voting could not, through numerical superiority, defeat the choice of minority voters.

After the plaintiffs filed a motion to alter and amend the judgment, the district court, albeit conceding that it had erred in its understanding of the statistical data, issued an opinion denying the motion. The district court found that Hispanics were in fact politically cohesive, but nevertheless the district court refused to alter the judgment because the plaintiffs still had not proved the third *Gingles* factor of legally significant Non Latin White bloc voting that caused defeat at the polls for the minorities' preferred candidates.

JURISDICTION

The county contends that we lack jurisdiction because the plaintiff-appellants failed to give timely notice of appeal. We disagree. A clerk in the district court provided plaintiffs' counsel with contradictory information concerning the date upon which the order denying the plaintiffs' motion to alter the judgment was entered. The clerk's statement to counsel led him to believe that the time for appeal under Fed.R.App.P. 4(a) had already expired, although in fact counsel still had two remaining

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[3] In the district court's order of October 5, it held that Hispanics were not politically cohesive. In the subsequent order issued in response to the plaintiffs' motion to alter and amend the judgment, the district court, upon reexamination of the statistical evidence, found that Hispanics were politically cohesive.

days to file a notice of appeal. Had counsel been informed accurately, he would have been able to file a timely notice of appeal. He was led, however, by the district court clerk's statement to believe that his only avenue was through Fed.R.App.P. 4(a)(5), which permits the district court, upon a showing of excusable neglect or good cause to extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a). Fed.R.App.P. 4(a) establishes the period for timely appeal in a civil case.

We have noted previously that the addition of the "good cause" language "indicates that the standard should be interpreted flexibly." *Davis v. Page*, 618 F.2d 374, 378 (5th Cir.1980) (citation omitted), *aff'd in part and rev'd in part on other grounds*, 640 F.2d 599 (1981) (en banc),[4] *vacated on other grounds*, 458 U.S. 1118, 102 S.Ct. 3504, 73 L.Ed.2d 1380 (1982). We hold that counsel's justifiable reliance on the district court clerk's erroneous information provides "good cause" under the unique circumstances of this case. Furthermore, this court, rather than "secondguess" the district court, defers to the district court so long as its decision does not constitute an abuse of discretion. *Id.; see also Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1063 (5th Cir.1979). Accordingly, we conclude that the extension of time was properly granted, the notice of appeal was timely filed, and that we have jurisdiction.

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[4] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

SUMMARY JUDGMENT AND STANDARD OF REVIEW

The county contends that it was entitled to summary judgment as a matter of law because the plaintiffs failed to "establish the existence of an essential element [of their case], and on which [they] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The district court agreed that the plaintiffs had failed to satisfy the third *Gingles* prong.

Generally, in summary judgment we review the district court's legal conclusions de novo. We are mindful that after trial of a vote dilution case, "the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781. Nevertheless, we may "correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982))). in this case, the district court's conclusion was premised on an erroneous application of the law, and we therefore reverse for application of "the governing rule of law."

APPLYING GINGLES

As noted above, this circuit is divided on the proper application of *Gingles*. In *Solomon*, the evenly divided court was united in stating that a plaintiff, at a minimum, must satisfy the three core *Gingles* factors. The en banc

court divided on the question of whether proof of the three core *Gingles* factors was sufficient and whether a defendant could raise as a defense the lack of racial bias in the community. As the court is of the unanimous opinion that the three core *Gingles* factors are *necessary* prerequisites to a vote dilution case, *see Solomon*, 899 F.2d at 1017-18 (Kravitch, J., specially concurring), 899 F.2d at 1034-36 (Tjoflat, C.J., specially concurring), we will discuss these requirements first as our resolution of the issues concerning the core factors may moot further concerns.

The heart of the dispute relates to the ability of the Non Latin White bloc usually to defeat the minority group's choice. The district court did not decide whether Non Latin White voters constituted a majority of the Dade County registered voters as the district court chose to decide "the case on other grounds. . . . " *Meek v. Metropolitan Dade County, Florida*, No. 86-1820, slip op. at 9 (S.D.Fla. Nov. 6, 1988) [hereinafter Order of November 6, 1988]. The ground relied upon by the district court was that the Non Latin White voting bloc, the existence of which the district court "cannot deny," *id.* at 8, did not *cause* the election losses suffered by Black and Hispanic voters. The court stated that to support the third prong of the *Gingles* test, "it is imperative that the plaintiffs demonstrate that the Non Latin White community not only vote [sic] as a bloc, but that they are a voting bloc majority." Order of October 5, 1988 at 20.

The district court's overall conclusion, common to both Blacks and Hispanics, that the Non Latin Whites did not cause the loss of candidates of either group rested on differing grounds as to each group. The district court

applied different rationales to the vote dilution claim of Blacks and Hispanics.

Dilution of the Black Vote

In its first order, the district court, noted that:

> a keen hostility in fact exists between . . . [Blacks and Hispanics. The expert's] affidavit shows that without exception, when a Black or Hispanic candidate is running against a Non Latin White candidate, the other minority group will vote for the Non Latin White. . . . In these elections [where Black candidates lost by a small margin], had there been no hostility between Blacks and Hispanics, the election of the Black over the Non Latin White would have been all but guaranteed.

Order of October 5, 1988 at 24 (record citation omitted).

In its second order, the district court reiterated that "one of the many conceivable reasons why Blacks in Dade County have difficulty in electing their preferred candidates [is that] Hispanics do not vote for them." Order of November 6, 1988 at 8. The district court then attributed Black losses, not to the white voting bloc's refusal to vote for the Black candidate, but to "[o]ther important factors includ[ing] lack of Hispanic support, name recognition, incumbency, low voter turnout, etc." The district court concluded that because in that court's view the plaintiffs had "failed to satisfy the causation element of *Thornburg [v. Gingles]*'s third prong, their claim of vote dilution must fail." *Id.*

The district court erred in its application of the causation prong of the *Gingles* analysis. The district court

was aware that the "multi-ethnic" nature of Dade County differed from the simple majority/minority context contemplated by *Gingles*. The district court, noting the hostility between Blacks and Hispanics, implicitly recognized that the hostility created a permanent anti-minority majority in Dade County, with Blacks siding with Non Latin Whites against Hispanic candidates, and Hispanics siding with Non Latin Whites against Black candidates. The district court, however, did not attribute to this phenomenon the appropriate legal significance.

Keeping in mind the Court's admonition that "[t]he essence of a § 2 claim is that a certain law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representative[,]" we consider the "functional effect" of the existing system. 478 U.S. at 48, 106 S.Ct. at 2765 n. 15. Here the social reality is that Black and Hispanic voters are hostile toward each other in the electoral arena. Similarly, Non Latin Whites are politically cohesive and tend not to vote for Hispanics or Blacks. The district court concluded that because Non Latin Whites by themselves could not block the electoral success of Blacks, Blacks had not succeeded in proving that Non Latin Whites caused the defeat of "minority" voters. The district court erred in failing to recognize that coalitions can form a legally significant voting bloc, and that a coalition of Hispanics and Non Latin Whites could form the relevant majority voting bloc for the purpose of the third *Gingles* factor.

Dilution of the Hispanic Vote

As to Hispanics in particular, the district court apparently concluded that Hispanic candidates did not lose because they lacked Black support; instead, Hispanic candidates lost because Hispanics were under-registered to vote in proportion to their population. The district court reasoned:

> the fact that the Hispanic population in Dade County is actually larger in size than any other group in the county including Non Latin White, that Hispanics could also be the largest segment of registered voters with an effective registration drive, and that it is conceivable that Non Latin Whites are not even a majority of the registered voters in Dade County, all combine to defeat the Hispanic defendants [sic] claims that their votes are being impermissibly diluted by a legally significant Non Latin White voting bloc.

Order of November 6, 1988 at 9-10.

In considering the import of the large population percentage of Hispanics, the district court in its initial order noted the authority of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). In *McKeithen*, the en banc court *reversed* the trial court and panel decisions, which had "held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish." 485 F.2d at 1300. Hence, the district court here properly rejected the county's contention that *Gingles* could not apply at all in

a setting where the Non Latin White bloc did not constitute a majority of the total population. Nevertheless, the district court interpreted the third *Gingles* prong as requiring the plaintiffs to prove that the Non Latin White bloc in and of itself could defeat the minority choice.

The district court concluded that Non Latin White bloc voting did not cause the defeat of Hispanic candidates; rather, the failure of Hispanics to register to vote was the reason Hispanics lost, i.e., if Hispanics registered and voted, their electoral success would be guaranteed. Critical to the district court's conclusion was its finding that Hispanics could constitute "the largest segment of registered voters with an effective registration drive." Order of November 6, 1988 at 10. There was, however, no evidence before the district court of voting age populations. The only evidence related to total population and numbers of registered voters.[5] We must, therefore, conclude that the district court erred in concluding that Hispanic underregistration causes electoral losses as there is no evidence of the relative numbers of voting age persons in the various voting blocs.[6]

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[5] *See, e.g.*, Leahy deposition. Our search of the record has not revealed a source of the district court's assertion, and we note that the county claims that there is no evidence in the record of voting age population.

[6] The district court's statement that Hispanics constitute the largest population group is irrelevant. Given the absence of any evidence as to numbers of voting age persons, the district court's statement that Hispanics could constitute the largest portion of registered voters is mere speculation. Similarly, the

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We conclude that Hispanics lose because Non Latin White candidates receive more racially polarized votes than Hispanic candidates. Furthermore, given the polarization of voting and the hostility between Blacks and Hispanics, the fact that Hispanics constitute no more than approximately 32.96% of registered voters[7] leads to the conclusion that Non Latin Whites and hostile politically cohesive Blacks form the remaining majority. Non Latin Whites alone are 48.67% of the registered voters.[8] In light of the district court's finding that Blacks and Non Latin Whites are politically cohesive and tend to vote against Hispanic candidates, such a setting is ripe for a vote dilution claim, and the Hispanic plaintiffs have demonstrated that third *Gingles* factor, that they usually are denied the opportunity to elect their preferred representatives because of an opposing voting bloc.

The County's Contentions

The county argues that the plaintiffs fail under *Gingles* because they cannot satisfy their burden of demonstrating that the plaintiff minority class will be able to elect more representatives under single-member district plan than it now elects under the at-large scheme. In

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district court's assertion that "it is conceivable that Non Latin Whites are not even a majority of the registered voters in Dade County" is entitled to no weight as we cannot decide cases based on what may be "conceivable."

[7] Leahy affidavit of March 17, 1988 (Leahy is Supervisor of Elections of Metropolitan Dade County).

[8] *Id.*

support of its claim, the county points to the first *Gingles* factor, which requires the minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates." 478 U.S. at 50, 106 S.Ct. at 2766 (footnote omitted).

We agree with the county that if the plaintiffs would have no greater opportunity to elect their preferred representatives under a single-member district plan, then they cannot show that the at-large scheme is causing their inability to elect their preferred representatives. *Gingles* addresses not only a group's ability to elect a satisfactory candidate (that is, a candidate for whom the minority voter is *willing* to cast a vote), but the group's ability to elect its *preferred* candidate. The county assumes that if a Black consistently has been elected from district three, then Blacks have been successful in electing their preferred candidate. Further, the county assumes that the only relevant inquiry relates to the ability of Blacks and Hispanics to elect representatives based on the residency populations as those districts are now drawn. Neither assumption, however, is necessarily true.

Relying on existing residence district borders, the county states that Hispanics and Blacks are a majority of registered voters only in districts two and three respectively, that a Hispanic and a Black have represented those respective districts for at least the past seven years, and concludes that neither Hispanics nor Blacks could attain

any greater electoral success by switching to single-member districting because Blacks and Hispanics would still only elect one representative each.

There are two hidden premises in the county's argument.

Existing District Lines

First, the county assumes that no other districts could be drawn that would permit Blacks or Hispanics to elect more representatives than they do now. The county's reliance on the makeup of the existing districts is misplaced. At issue is whether the population distribution could be differently apportioned among redrawn districts such that minority Black and Hispanic voters have greater representation. According to the Supreme Court, "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17. In *Thornburg v. Gingles*, the district court did not simply count the votes within the existing districts, but considered whether new districts could be drawn that would enable Blacks to enjoy greater representation more in keeping with their numbers in the population. *See Gingles*, 478 U.S. at 38, 106 S.Ct. at 2760.

The district court should consider whether single-member districts could be drawn which would permit Blacks and Hispanics equal opportunity to elect representatives of their choice. That is the baseline against which the existing at-large system should be measured. We agree with the observation made by Chief Judge Tjoflat in

his now-vacated panel opinion in *Solomon* that "[o]f course, the resulting single-member electoral system must achieve a more proportional representation of minorities than did the previous multi-member system." *Solomon v. Liberty County*, 865 F.2d 1566, 1572 n. 5 (11th Cir.1988) (vacated). The district court, however, did not address whether alternative districts could be drawn such that Blacks would have the opportunity to elect one representative from a "safe" district and also have the possibility of occasionally electing a representative from a more marginal "swing" district. Section two does not provide a guarantee of proportional representation. It does, however, require equal opportunity to participate and elect representatives of the minority group's choice.

Preferred Representatives

Second, the county assumes that the Hispanic and Black representatives elected from districts two and three are the "*preferred* representatives" of the respective minorities. That is not necessarily so.

Whether the candidate elected is the preferred candidate of a particular minority group turns on more than the candidate's race. The at-large scheme could cause the candidate elected from the Black and Hispanic residence district to be someone who is less responsive to the particular needs of an insular community than would be the case under a single-member district structure. Naturally, the less responsive candidate would not be the "preferred" candidate when evaluated against a single-member district baseline and the candidate who would be elected under that system. For example, in an at-large

system, the candidates from a Black or Hispanic residence district who hold themselves forth for at-large election may not be the preferred candidate of the minority group, but rather may be a candidate who is perceived as viable *given* the at-large election scheme. *Cf. Gingles*, 478 U.S. at 76 n. 37, 106 S.Ct. at 2779 n. 37 (success of Black candidate not always attributable to support in the Black community). Although the representative from district three, by way of example, is in fact Black, that does not mean that particular candidate is the preferred candidate of Black voters; the candidate may be a person for whom Blacks are willing to vote when the alternative would be the election of a White candidate, but that does not mean that the same candidate would be elected in a single-member district plan. In contrast, under a single-member district plan, a candidate who, because he or she is more responsive to Black concerns, is the preferred candidate of Blacks could be elected even though he or she is unacceptable to White voters and would not be elected under an at-large scheme. In short, the at-large scheme may cause the Black candidate to be someone other than the preferred candidate of Black voters. That a candidate is of the race of the group is not dispositive; the legal standard is whether the candidate is the preferred candidate of the minority group.

Whether a given minority candidate who has long enjoyed electoral success is the preferred representative requires appraisal of local facts within the ken of the district court and best left to it.

Alternative Avenues Open to Minorities

At oral argument, the county objected to any judicial involvement on the ground that Blacks and Hispanics by joining together have sufficient political clout to change the electoral system by instituting a referendum as permitted by Florida law. Assuming that such a referendum is available, the plaintiffs nevertheless have the right to pursue their judicial remedy as provided by federal statute, rather than embarking on the task of effecting change through the referendum method. Minorities have resorted frequently to the federal courts for vindication of their rights. Moreover, we note that minorities may be less successful at organizing and orchestrating voting campaigns than are other groups, and may therefore prefer the statutory remedial scheme. Finally, the fact that a minority group may perceive itself as less successful in the political arena may cause diminished participation in such a referendum. Regardless of the viability of alternative avenues, the plaintiffs are entitled to enjoy their statutory right to seek redress in the federal courts, and we cannot deny it to them.

Summation

In sum, as to the first *Gingles* prong, we affirm the district court's conclusion that the plaintiffs have satisfied their burden. The second prong is not in dispute. As to the third *Gingles* prong, we conclude that the district court's legal analysis was premised upon legal error.

TASK ON REMAND

As the district court here denied relief based on its erroneous interpretation of the third *Gingles* factor, we remand for reconsideration in light of the principles enunciated here. *See Gingles*, 478 U.S. at 78-79, 106 S.Ct. at 2781. Specifically, the district court must decide whether Blacks or Hispanics have thus far usually elected preferred representatives. The court should also consider whether Blacks or Hispanics are impaired in their ability to elect representatives of their choice by the manner in which the voting districts are now drawn. This case does not require us at this juncture to reenter those disputed issues that divided the en banc court in *Solomon*. Under the *Gingles* principles enunciated here, the district court could still conclude that the plaintiffs have not satisfied the three necessary *Gingles* requirements: the district court could find that Blacks and Hispanics have elected their preferred representatives, and that the existing districting plan does not impair the ability of either group to elect representatives of its choice. In that event the issue of affirmative defenses would not be reached. If the district court found the plaintiffs to have satisfied the three *Gingles* factors, it appears on the facts of this case, where the district court has found the existence of racial hostility between Blacks and Hispanics driving electoral results, that under either view of the *Solomon* en banc court, the plaintiffs might be entitled to relief. Given the posture of this case, we decline to assume the existence of facts in order to apply the law hypothetically. Further, the Supreme Court has made clear that the district court should analyze the facts in the first instance. We therefore

decline to reach issues not necessary to the decision of this case.

REVERSED and REMANDED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5146

(Filed OCT 16 1990)

CARRIE MEEK, et al.,

Plaintiffs-Appellants,

versus

METROPOLITAN DADE COUNTY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 17, 1990, 11th Cir., 1990, ___ F.2d ___).

(October 16, 1990)

Before: KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

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* Honorable Frank A. Kaufman, Senior U.S. District Court Judge, sitting by designation.

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phillis Kravitch
UNITED STATED CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-1820-CIV-RYSKAMP

CARRIE MEET, et al.,
Plaintiff,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, et al,
Defendant.

_____/

ORDER DENYING PLAINTIFFS' MOTION TO ALTER SUMMARY FINAL JUDGMENT

I. INTRODUCTION

THIS CAUSE is before the court upon the plaintiffs' motion to alter summary final judgment, filed October 18, 1988. The gravamen of the plaintiffs' motion to alter is that the court did not interpret properly the data contained in an affidavit by Professor Genie Stowers. Professor Stowers used a homogeneous precinct analysis, which examined the voting patterns in precincts where 90 percent of the registered voters were either Black, Non Latin White, or both Non Latin White and Hispanic (called "White" in the affidavit).[1] Professor Stowers also used a bivariate ecological regression analysis that

[1] Professor Stowers stated in her February 11, 1988 affidavit that in none of Dade County's precincts was the pool of registered voters 90 percent Hispanic. Thus, precincts falling under the category of "Whites" in Professor Stowers' analysis were those where Non Latin Whites and Hispanics together comprised 90 percent of the registered voters. This is not to say, however, that these tables say nothing about Hispanic voting patterns.

measured the strength of the relationship between the percentage of minority or majority voters in each precinct, and the percentage of vote for the candidates in each precinct. The court agrees with the plaintiffs' contention that the court did not properly apply all of the statistics put forth by the plaintiff. Yet, for the reasons set forth below, the plaintiffs' motion to alter summary final judgment is denied.

II. LEGAL STANDARD FOR A VOTE DILUTION CLAIM

By this state of the litigation, it is axiomatic that a plaintiff seeking relief under Section 2 of the Voting Rights Act must be part of a minority group that is sufficiently large in size and geographically compact that it comprises a majority within a single member district. *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752, 2766, 92 L.Ed.2d 25, 46 (1986). The minority group must also be able to show that it is politically cohesive, and that the majority votes as a bloc, usually to defeat the minority's preferred candidate. *Id.* at 51, 106 S. Ct. at 2767, 92 L.Ed.2d at 47. It is important to note that all polarized voting does not rise to the level of legal significance under the Act. Rather, a minority must be able to demonstrate that a Non Latin White voting bloc has impaired its ability to elect candidates of its choice.

In its order, this court found that both Blacks and Hispanics satisfy the first prong of the *Thornburg* test. It is the opinion of this court, however, that in attempting to

establish a vote dilution claim, the plaintiffs have incorrectly merged the other two prongs. Presumably, the purposes of conducting analyses of racially polarized voting such as those done by Professor Stowers are to ascertain the political cohesiveness of minority group members, and to determine the existence of a legally significant Non Latin White voting bloc. *Id.* at 56, 106 S. Ct. at 2769, 92 L.Ed.2d at 50. This requires discrete inquiries into the voting practices of both minorities and Non Latin Whites. *Id.*; *see Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988); *Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557 (11th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1111, 99 L.Ed.2d 272 (1988); *see also Buchanan v. City of Jackson*, 683 F. Supp. 1515, 1526 (W.D. Tenn. 1988) (highlighting the distinction between minority "cohesiveness" and majority "bloc voting"). The statistics submitted by the plaintiffs do include data as to the voting practices of all three sizable ethnic components of Dade county's registered voters, and in no way does the court wish to challenge the validity or appropriateness of these methods of statistical analysis as techniques to determine and synthesize voter behavior. The difficulty with this case lies not in interpreting what the data says, but in whether the data addresses all aspects of the *Thornburg* threshold test. In other words, this court is of the belief that the only connection between the election statistics submitted in this case, and the existence of a legally significant Non Latin White voting bloc in Dade county, is the plaintiffs' naked assertion that there is one.

III. IS THERE A LEGALLY SIGNIFICANT NON LATIN WHITE VOTING BLOC?

The use of homogeneous precinct analysis and bivariate regression analysis in this case has convinced

this court of the political cohesiveness of both Blacks and Hispanics. The plaintiffs have sufficiently shown that a significant number of minority group members usually vote for the same candidates. Thus, the plaintiffs have established "minority" bloc voting. *Thornburg*, 478 U.S. at 56, 106 S. Ct. at 2770, 92 L.Ed.2d at 50; *see also Houston v. Haley*, 663 F. Supp. 346, 351 (N.D. Miss. 1987) (stating that although minorities also engage in bloc voting, the more important voting which a court may consider is the white bloc), *aff'd*. ___ F.2d ___, 1988 WL 106, 239 (5th Cir. 1988).[2]

The *Thornburg* Court, however, had difficulty in defining the degree of bloc voting which constitutes the threshold of legal significance, and stated that it will vary from district to district. *Id*. at 55, 106 S. Ct. at 2269, 92 L.Ed.2d at 50. Yet, a legally significant Non Latin White voting bloc must be able to "minimize or cancel" the ability of minorities to elect representatives of their choice. *Id*. at 56, 106 S. Ct. 2270, 92 L.Ed.2d at 50. Thus, the *Thornburg* standard of legal significance requires that the Non Latin White voting bloc be the cause of the minorities' political woes.[3] Stated more succinctly, in

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[2] It is conceivable that in some parts of the country, a group of Black plaintiffs in a vote dilution case could sue Non Latin Whites and Hispanics together, claiming that they form a legally significant "White" voting bloc. The political cohesiveness of Blacks, Hispanics, and Non Latin whites in Dade county, however, makes this impossible in the instant case. The plaintiffs have shown that each group votes as a distinct bloc, and is incapable of being grouped with any other such bloc.

[3] Requiring that the Non Latin White voting bloc be the cause of the minority's inability to elect its preferred

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most of the elections where minority voters have been unable to elect their preferred candidate, that candidate would have won if not for the Non Latin White voting bloc. The evidence submitted by the plaintiff has sufficiently demonstrated that Non Latin Whites vote as a bloc in Dade county. It is in the causation element of the third *Thornburg* prong that the plaintiffs have failed to establish a vote dilution claim.

In examining all of the testimony given in this case, in conjunction with the results of some of the more recent

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candidates is consistent with the Court's initial requirement that the minority group be sufficiently large and geographically compact. The premise behind this first *Thornburg* prong is that vote dilution can only occur when the minority voters possess the potential to elect representatives of their choice, absent the allegedly dilutive mechanism. *See Thornburg*, 478 U.S. at 50 & N.17, 106 S. Ct. at 2766 & n.17, 92 L.Ed.2d at 46 & n.17. Similarly, the third prong also requires that the minority group have the ability to elect its preferred candidates absent such a Non Latin White voting bloc. It is therefore insufficient to examine only whether there is a Non Latin White voting bloc, but rather a court deciding a Section 2 claim must also look to whether that bloc has enough power to cause the minority's lack of access to the political process.

It is important to note that the causation inquiry undertaken by this court is entirely different from the causation inquiry rejected in the *Thornburg* opinion. In that case, Justice Brennan held irrelevant any inquiry into what causes Blacks and Whites to vote as they do. *Thornburg*, 478 U.S. at 63, 106 S. Ct. at 2773, 92 L.Ed.2d at 54. This question is wholly unrelated to whether a Non Latin White voting bloc causes minorities to lose access to the political process.

elections submitted by Professor Stowers,[4] the court has concluded that a very significant reason that Black voters may not have been able to elect the representatives of their choice is because Hispanics do not vote for them. As the following calculations will demonstrate,[5] in several of the elections analyzed, if only a very small percentage of Hispanic voters voted for the Black minority's chosen candidates, then that candidate would have won.[6]

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[4] Although the court has examined all the data submitted in this case, it believes it prudent to pay especially close attention to the elections of the 1980's, because in examining these elections, Professor Stowers was looking at an electorate most like the one that existed at the time of this suit. The perpetual reformation of Dade county's population makes it a particularly difficult place to examine the present by studying the past.

[5] The court is aware that these calculations are rather rough, and perhaps make assumptions that are not fully substantiated by evidence put forth in this case. furthermore, the court does not purport to be a statistician. These calculations, however, are intended to serve two purposes. First, they illustrate how it is possible that Professor Stowers' statistics do not adequately address the issue of legally significant Non Latin White bloc voting in Dade county. Second, the number of Hispanic voters needed to put a Black candidate over the top, according to the court's figures, is so low that even a substantial margin or error would not disturb the court's position that Non Latin White bloc voting could not be the cause of Blacks' inability to elect their preferred candidates.

[6] In making these calculations, the court has made the following assumptions. First, the court is assuming that the vast majority of Dade county residents live in either Black, Non Latin White, or White homogeneous precincts. Professor Stowers' homogeneous precinct analyses routinely have

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The first election in the court's analysis is the September 2, 1986 County Commission election between Raymundo Barrios, a Hispanic, Betty Ferguson, a Black, and Barry Schreiber, a Non Latin White. Affidavit of Professor Genie Stowers at 12. According to Professor Stowers, there are a total of 675,828 registered voters in homogeneous precincts. Assuming that Hispanic voters comprise 33 percent of the registered voters, there are 223,023 Hispanic registered voters. Betty Ferguson lost the election by approximately 7,000 votes. Thus, if she had received only 3 percent of the Hispanic registered voters, she would have won. The fact that there was a Hispanic in the race adds another interesting point to the analysis. If there are 223,023 Hispanic registered voters, then there are approximately 279,940 Non Latin White registered voters in "White" precincts. Assuming that Non Latin White voters who live in "White" precincts turn out to vote in the same percentage as in Non Latin White precincts, approximately 26 percent, then 72,784 Non Latin White voters from "White" precincts actually voted. Because Professor Stowers claims that 126,686 total

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between six and eight hundred thousand people, very close to the total number of registered voters in the county. The premise behind this assumption is that Professor Stowers' samples are representative of the county as a whole, such that it is easier to predict "what might have been" in Dade county than in a more integrated county where there would be many fewer homogeneous precincts. Second, for purposes of these calculations, the court is assuming that Hispanics comprise 33 percent of the registered voters in the county. *See* Affidavit of David C. Leahy at 2 (March 17, 1988).

votes were cast in "White" precincts, then 53,902 Hispanic votes were cast. For purposes of argument, assume that all of the 28,848 votes cast for Barrios were by Hispanic voters. That leaves 25,054 Hispanic votes remaining. In addition, assume for purposes of argument that all 12,159 ballots case in Black homogeneous precincts were for Ferguson. That leaves 58,559 Non Black votes for Ferguson. Under this scenario, if Ferguson had received only 28 percent of the votes that Hispanics gave to Non Hispanics, then she would have won. Thus, at least 72 percent of the Hispanics who did not vote for a Hispanic voted for a Non Latin White. Conversely, if 12 percent of the Non Black votes given to Ferguson were cast by Hispanics, then she would have won.

To further illustrate its point, the court looked to the September 30, 1986 County Commission runoff election between Betty Ferguson and Barry Schreiber. Affidavit of Professor Genie Stowers at 14. There were 675,828 registered voters in Homogeneous precincts in Dade county. Assuming that Hispanics comprise approximately 33 percent of the registered voters in the county, then there were 223,023 Hispanic registered voters. Ferguson lost the election by a margin of 10,766. Thus, if she had received the votes of only 5 percent of the Hispanic registered voters, *in a race where there wasn't even a Hispanic candidate,* she would have won. The examples outlined above demonstrate one of the many conceivable reasons why Blacks in Dade county have difficulty in electing their preferred candidates; Hispanics do not vote for them. Although the court cannot deny the existence of a Non Latin White voting bloc, the evidence submitted by the plaintiffs does not convince this court that such a bloc

causes the loss of these candidates. Other important factors include lack of Hispanic support, name recognition, incumbency, low voter turnout, etc. Because the Black plaintiffs have failed to satisfy the causation element of *Thornburg*'s third prong, their claim of vote dilution must fail.

It is more difficult to find elections where additional Black support would have enabled the preferred candidate of Hispanic voters to defeat the preferred candidate of Non Latin White voters. This is so because of the significantly lower number of Black voters than Non Latin White or Hispanic voters. Thus, even if Blacks voted for Hispanics in greater numbers than Hispanics vote for Blacks, their ability to influence elections is limited by their small percentage of the population, and their smaller percentage of Dade county's registered voters. Yet, one fact that looms large is that Non Latin Whites comprise a significantly greater percentage of the registered voters in Dade county than they do of the population as a whole. Affidavit of David C. Leahy at 2 (March 17, 1988). At the same time, Hispanics comprise a significantly smaller percentage of the registered voters in Dade county than they do of the population as a whole. *Id.* These rather simple statements lead to the even simpler conclusion that Hispanics register less than Non Latin Whites. Throughout Professor Stowers' bivariate regression analyses of elections in Dade county, she states that with regard to Non Latin White, Black, and Hispanic voters, ethnicity accounted for a significant percentage of the vote. The court fails to see how this conclusion goes to anything other than political cohesiveness, in the context of Dade county. It is undeniable that Hispanic voters

gave tremendous support to Hispanic candidates. The problem for the preferred candidates of Hispanic voters is that there are not enough Hispanic voters in proportion to their status as the largest ethnic group in the county.

There also remains an open question of whether Non Latin Whites actually are a majority in Dade county. *See* Order Granting Defendants Motion for Summary Final Judgment at 20-22 (October 5, 1988). The defendants claim that *Thornburg* does not apply to the plaintiffs' case because Non Latin Whites do not constitute a majority of the registered voters in Dade county. The court, although deciding the case on other grounds, noted that it is a very close call as to whether Non Latin White registered voters are in fact a majority in Dade county. For present purposes, the status of Non Latin Whites as a majority is important not in determining the applicability of *Thornburg*, but rather in measuring the ability of a Non Latin White voting bloc to dilute the votes of Hispanics. The fact that the Hispanic population in Dade county is actually larger in size than any other group in the county including Non Latin Whites, that Hispanics could also be the largest segment of registered voters with an effective registration drive, and that it is conceivable that Non Latin Whites are not even a majority of the registered voters in Dade county, all combine to defeat the Hispanic defendants claims that their votes are being impermissibly diluted by a legally significant Non Latin White voting bloc. In terms of preventing Hispanic voters from participating in the political process, this court finds that the Non Latin White voting bloc is not nearly as powerful as plaintiffs assert.

In denying the plaintiffs' motion to alter summary final judgment, the court wishes to emphasize that it is not holding that legally significant Non Latin White bloc voting could not be proven by either method that Professor Stowers used to analyze the Dade county electorate.[7] It may be the case, however, that Dade county is sufficiently unique in its geopolitical makeup that these tests need to be supplemented in some way to enable Voting Rights Act plaintiffs in jurisdictions such as this to meet the *Thornburg* criteria.

Although the *Thornburg* Court admitted difficulty in construction a definitive test for determining legally significant Non Latin White bloc voting, it did list several factors that plaintiffs could use to supplement their statistical arguments. These factors include such potentially dilutive mechanisms as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of a minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field. *Thornburg*, 478 U.S. at 56, 106 S. Ct. at 2770, 92 L.Ed.2d at 50. The plaintiffs

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[7] Courts have applied homogeneous precinct analysis and bivariate regression analysis to find that a Non Latin White voting bloc impermissibly dilutes the votes of minorities. It is telling, however, that often in cases such as these, Non Latin White voters comprise a clear majority, unlike the situation in Dade county. *See, e.g., Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) (16 percent Hispanic, 9 percent Black); *Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987) (17 percent Black); *Buchanan v. City of Jackson*, 683 F. Supp. 1515 (W.D. Tenn. 1988) (34 percent Black).

have relied almost exclusively on statistics, and have not incorporated the aforementioned factors into their vote dilution claim.

IV. CONCLUSION

The court has considered and analyzed the election statistics submitted by the plaintiff. Also, as the court's order granting the defendants' motion for summary judgment emphasized, the decision in this case is the product of an "intensely local appraisal" of the totality of the circumstances to determine whether the political process is open to minority voters. *Thornburg*, 478 U.S. at 79, 106 S. Ct. at 2781, 92 L.Ed.2d at 64-65. Accordingly, it is hereby:

ORDERED AND ADJUDGED that the plaintiffs' motion to alter summary final judgment is DENIED.

DONE AND ORDERED in chambers at the United States District Court, Miami, Florida this 6 day of November 1988.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

cc: to all counsel or record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-1820-CIV-RYSKAMP

CARRIE MEEK, et al.,

Plaintiffs,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Defendants.
_____/

SUMMARY FINAL JUDGMENT

THIS CAUSE is before the court upon the motions of the defendants and plaintiffs for summary final judgment. The court, having carefully reviewed the motions, all supporting and opposing memoranda of law, the affidavits, admissions and depositions on file, and having heard extensive oral argument of counsel in this action, hereby enters summary final judgment in favor of the defendants for the reasons set forth below.

I. INTRODUCTION

The plaintiffs contend that the present system of electing members to the Dade County Board of County Commissioners impermissibly dilutes the voting strength of both Black and Hispanic voters, deprives them of their rights under the fourteenth and fifteenth amendments to the United States Constitution, and is also violative of their statutory rights provided by Section 2 of the Voting Rights Act of 1965, as amended, 96 Stat. 134, 42 U.S.C.

§1973) (1982).[1] The plaintiffs predicate their action on the decision of the Supreme Court of the United States in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The plaintiffs seek (1) a declaration that the use of at-large staggered term elections for the nomination and election of members of the Dade County Board of County Commissioners violates Section 2 of the Voting Rights Act; (2) the entry of a permanent injunction preventing the defendants from conducting, supervising, or certifying the results of any further at-large elections to the Board of County Commissioners; (3) an order requiring the defendants to implement a system of electing members to the Board of County Commissioners

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[1] Section 2 of the Voting Rights Act reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. §1973(a)&(b)(1982)

which affords plaintiffs the opportunity to elect representatives of their choosing, and which does not dilute minority voting strength; and (4) costs and reasonable attorneys fees.

As a threshold issue, the defendants contend that the lack of the existence of a majority group among the population of Dade County renders Section 2 of the Voting Rights Act inapplicable to Dade County. In addition to this threshold argument, the defendants submit that the present at-large system of electing Commissioners neither dilutes anyone's votes, nor results in any abridgement of the voting rights of either Black or Hispanic voters in Dade County, so as to constitute a denial of their rights to equal access to the political process, and to elect representatives of their choice.

II. THE PARTIES

Plaintiffs Carrie Meek, James C. Burke, George F. Knox, and Ralph Packingham are black adult citizens and registered voters in Dade County. Plaintiffs Xavier Suarez, Maurice A. Ferre, Pedro Jose Gonzalez, Victor De Yurre, Prisciliano Falcon, and Orlando Urra are Hispanic citizens and registered voters in Dade County, as well. Defendants are Metropolitan Dade County, and Dade County Board of County Commissioners, David Leahy, Supervisor of the Dade County Elections Department, and the members of the County Canvassing Board.

III. Dade County Commission: Election and Structure

The Dade County Board of County Commissioners is the legislative and governing body of the county. Dade County Charter at §1.01. The Board is composed of nine members: the Mayor and eight Commissioners. The Mayor is elected by electors of the county at large, and serves as a member of the Board. The Mayor has no greater power than any other Commissioner, except that the Charter provides that the Mayor serves as Chairman of the Board. The Charter also directs the mayor to prepare and deliver a report on the state of the County, prepared after consultation with the County Commissioners and the County Manager. The County Manager, appointed by the full County Commission, is the chief executive officer, and head of the administrative branch of the county government.

Unlike the Mayor, who may reside anywhere, County Commissioners are required to run from designated districts. The Charter requires that from "each of eight districts there shall be elected by the qualified electors of the county at large a County Commissioner." *Id.* at §1.04(1).

The Mayor and the Commissioners are each elected to four year terms. The terms of the Commissioners are staggered; that is, four Commissioners are elected every two years. Candidates for County Commissioner must be elected by a majority of the votes cast. The Charter provides that "[i]f no candidate receives a majority of the votes cast there will be a runoff election at the time of the state second primary election between the two candidates receiving the highest number of votes. Should a tie result, the outcome shall be determined by lot." *Id.* at §2.01(B).

Vacancies on the Board can be filled by a special election or, until the next county-wide election, by a majority vote of the remaining members of the Board.

IV. Constitutional Claims

In order to prevail on their constitutional claims, the plaintiffs must establish that the present method of electing Commissioners is being maintained for a discriminatory purpose. *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980). While the Complaint, at paragraph 29, alleges such a discriminatory purpose, it does not appear from the written filings or oral arguments that the plaintiffs are pursuing these claims. There has been no evidentiary showing of such a discriminatory purpose. Accordingly, plaintiffs' constitutional claims must fail.

V. The Standard in Vote Dilution Cases

The fifteenth amendment to the Constitution of the United States guarantees each citizen a racially unconditioned right to vote. Upon its finding that judicial remedies for violations of this right were inefficient and often inconsistent, Congress enacted the Voting Rights Act of 1965. 42 U.S.C. §1973 et seq. (1982); *see South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966) (upholding the constitutionality of the Act). The Supreme Court of the United States initially interpreted Section 2 of the Act to require plaintiffs seeking the Act's protection to prove purposeful discrimination on the part of state or local governing bodies, charged with administering public elections. In *City of*

Mobile v. Bolden, the court held that a state legislative apportionment plan, which utilized at-large elections or multiple representatives from a single district, could not be held violative of the Act absent a showing of such discriminatory purpose. 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980); *see also City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L.Ed.2d 119 (1980) (finding that Congress had the power under the fifteenth amendment to prohibit electoral patterns that were not intentionally discriminatory).

The *Mobile* and *Rome* decisions prompted Congress to amend the Voting Rights act, so that courts would look more toward discriminatory effects, and less toward discriminatory intent. In addition to codifying this "results test," Congress set forth a series of factors that might be probative of a Section 2 violation.[2] These "Senate Factors" were attached to the bill that amended section 2, in order to assist courts in resolving the salient question raised by section 2 plaintiffs: "Whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." *Thornburg*, 488 U.S. at 44, 106 S. Ct. at 2763, 92 L.Ed.2d at 43.

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[2] The *Thornburg* Court shaped the most compelling elements of the Senate Factors into a three part test, which the plaintiffs in this case have failed to meet. Had these preconditions been satisfied, the court would have then analyzed the statistics and other evidence submitted in the context of these nine factors. For a complete listing of the Senate Factors, *see Thornburg*, 478 U.S. at 36-37, 106 S. Ct. at 2759-60, 92 L.Ed.2d at 38.

The Court applied the 1982 amendments for the first time in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 92 L.Ed.2d, 25 (1986). The *Thornburg* Court affirmed a district court's ruling that a North Carolina redistricting plan violated the amended Section 2. The court also set forth detailed legal standards for adjudicating Section 2 claims.

As a preliminary matter, the court denied plaintiffs the benefits of any presumptions or per se tests in prosecuting their Section 2 claims. The court refused to find certain electoral devices per se violative of Section 2, refused to bestow upon any group a right to proportional representation, and required plaintiffs to prove the existence of any racial bloc voting. *Id.* at 46, 106 S. Ct. at 2764, 92 L.Ed.2d at 43-44. What the court did do, however, was mold the Senate Factors into three necessary preconditions for the establishment of a Section 2 violation. *Id.* at 48-51, 106 S. Ct. at 2765-67, 92 L.Ed.2d at 45-47. After *Thornburg*, the Senate Factors are to be used directly only after each of the three preconditions are met. *See also Carrolton Branch of the National Association for the Advancement of Colored People v. Stallings*, 829 F.2d 1547 (11th Cir. 1987).

First, a Section 2 plaintiff must be part of a minority group that is sufficiently large in size, and geographically compact, that it comprises a majority within a single-member district. A minority group without this concentrated strength will not be heard, as it is clear that the mechanism by which representatives are elected cannot be the reason for the group's inability to elect its chosen representative. A group must have the potential to win, before it can claim that the system is responsible for that

potential not being fulfilled. Second, the minority group must be able to show that it politically cohesive. Without a demonstration that the minority group will vote as a unit, rather than as factions, a Section 2 cause must fail. Finally, the minority must prove that the majority votes as a bloc, usually to defeat the minority's preferred candidate. The court went on to say that if the majority's success is practically certain, this bolsters a claim of vote dilution, and negates a defendant's arguments that a majority win may be the exception, and not the rule.

In evaluating the plaintiffs' claim of vote dilution, this court is charged with making a realistic consideration of the totality of the circumstances, and to determine, whether the political process is open to minority voters. This determination requires "an intensely local appraisal" of the facts and allegations of each particular case. *Thornburg*, 478 U.S. at 79, 106 S. Ct. at 2781, 92 L.Ed.2d at 64-65. In the pages that follow, the court has attempted to point out the uniqueness of Dade County as the setting for a vote dilution claim. The court wishes to emphasize that its responsibility is not to decide what is best for the citizens of Dade County. Rather, it is the duty of this court to determine whether the plaintiffs in this case have sufficiently proven that the defendants have violated an Act of Congress, as interpreted by the Supreme Court of the United States.

VI. Plaintiffs' Case in Favor of Vote Dilution

The plaintiffs submit that the present at-large electoral system for electing members of the Board of County Commissioners impermissibly dilutes the voting strength

of Blacks and Hispanics in Dade County, Florida in violation of Section 2 of the Voting Rights Act. The plaintiffs state that the county's at-large voting procedures result in an abridgement and denial of the plaintiffs' voting rights on account of race or membership in a language minority. According to this view, the electoral system allows the Non Latin White majority, voting as a bloc, to exclude from office candidates supported by the Black and Hispanic minority groups. The plaintiffs contend that in cases of both Blacks and Hispanics, the three necessary preconditions set forth by the Supreme Court in *Thornburg* to establish a vote dilution claim have been met.

As to the first prong of the *Thornburg* test, the plaintiffs submit the deposition of Charles W. Blowers, Chief of the Research Division of the Metro-Dade Planning Department, for the proposition that both minority groups in Dade County reside in geographically compact areas. According to Blowers, census tracts that contained 90 percent of the Blacks in Dade County contained only 10 percent of Non Latin Whites; census tracts that contain 90 percent of the Hispanics in Dade County contain less than 50 percent Non Latin Whites. In addition, the plaintiffs state that registered voters among Blacks and Hispanics are geographically compact. As of March 1988, County Commission District 2 was composed of 54.1 percent Hispanic voters and County Commission District 3 was composed of 61.1 percent Black voters.

The plaintiffs also contend, in support of the second prong, that each of the minority groups is politically cohesive. In support, the plaintiffs cite to the affidavit of Genie Stowers, Professor of Political Science and Public

Affairs at the University of Alabama at Birmingham. Professor Stowers examined fifteen elections held between 1976 and 1986 in Dade County. She concluded, based upon homogenous precinct and bivariate regression analyses, that there was a consistent relationship between the race or ethnicity of the voter and the vote cast for minority candidates, reflecting that, as a group, they are politically cohesive. Affidavit of Professor Genie Stowers at 3 (Feb. 11, 1988). In each of the races examined, Professor Stowers concluded that there was a strong positive correlation between the presence of Black or Hispanic voters in precincts, and the support shown for the candidates that belonged to those groups.

Finally, as to the third prong of the *Thornburg* test, the plaintiffs submit that Dade County's Non Latin White majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidates. Again, the plaintiffs rely on the analysis of Professor Stowers to prove this point. Relying on the same data used to support the conclusion that Blacks and Hispanics are racially polarized, Professor Stowers concludes that Non Latin White voters consistently voted as a bloc against minority candidates when there was a Non Latin White candidate in the race.

VII. Defendants' Case in Rebuttal

In support of their case for summary judgment, the defendants assert that Dade County does not present the usual setting for a challenge to an at-large election system. As in *Thornburg*, the more typical backdrop involves a community composed of a large Non Latin White

majority and a small, discrete Black minority. In contrast, the defendants characterize Dade County as a tri-ethnic community in which no segment of the population constitutes a majority; Hispanics comprise 43 percent, Non Latin Whites comprise 37 percent, and Blacks make up 20 percent of the population. The defendants maintain, therefore, that the *Thornburg* analysis does not apply to Dade County, and that they are otherwise entitled to judgment as matter of law because no single ethnic group constitutes a majority. Indeed, the defendants note that together the plaintiffs comprise a majority of the population, as well as of the registered voters. According to the defendant, the plaintiffs do not dispute that the existence of a bloc voting majority is essential to a vote dilution claim. Rather, the plaintiffs counter that if Hispanics who were born in this country are added to the Non Latin White population, then the aggregate will constitute a majority of the pool of registered voters. The defendants respond that the plaintiffs have neither provided any evidence or legal authority to support their contention that Hispanics born in this country should be aggregated with Non Latin Whites in order to constitute a majority of registered voters, nor have they made the required showing for using registered voters as the relevant population in a vote dilution claim.

The defendants submit that no single racial or ethnic segment constitutes a majority in Dade County, and blame Hispanics' apathy for their underrepresentation on the Commission. At oral argument, the defendants contended that if Hispanics, the largest segment of Dade County's population, registered and voted, then they

would solve their political problems. Transcript of Hearing at 23 (Jan. 27, 1988). The defendants argue that if members of an ethnic group fail to register and vote because of their own inaction, as opposed to any impediment attributable to the electoral structure, they cannot be heard to complain about vote dilution.

The defendants contend that Blacks have been able to elect candidates to public office. They cite to the fact that in the instant case, there was continuously been a Black County Commissioner for the past twenty-five years. If there were two Blacks on the Commission, defendants contend, Blacks would be "over-represented," in the sense that they would exceed their percentage in the population. Although the defendants recognize that a minority group is not entitled to proportional representation, they contend that where a minority group has enjoyed persistent proportional representation, they contend that where a minority group has enjoyed persistent proportional representation, as have Blacks in Dade County, their vote dilution claim should fail.

The plaintiffs argue that many of the Blacks on the Commission were first appointed, and therefore were "safe" candidates, rather than the preferred candidates of Blacks. Defendant's reply that no evidence is before the court to support this theory. They claim the opposite is true; that the Black Commissioners, including the present one, have overwhelmingly carried the "Black District," District 3, both within the district and county-wide, in elections including other Black candidates.

According to the defendants, the Hispanic plaintiffs have likewise failed to make this showing outside the

Hispanic District (District 2), in which there has continously [sic] been a Hispanic Commissioner for the past seven years. To further support their contention that minorities have been able to elect their preferred candidates, the defendants argue that in the entire thirty year history of Metropolitan Dade County government under Home Rule, only a single Hispanic candidate – and no Black candidate – has ever prevailed in his district but lost countywide. Affidavit of David C. Leahy at 4 (Nov. 12, 1988).

VIII. Analysis

A. Applicability of the *Thornburg* Decision

There is no doubt that Dade County presents an unusual setting for a vote dilution claim. Contrary to the situation in North Carolina, where the *Thornburg* court considered the vote dilution claim against the backdrop of a state which had a clear Non Latin White majority (80 percent), and a Black minority (20 percent), and had been that way for many years, Dade County presents a dynamic, evolving community. Over the last fifteen years Dade County has experienced a tremendous influx of people from other countries and other states, and the frequency of immigration among the former group has become exceptional during the 1980's. Thus, although the plaintiffs have referred to Dade County as a tri-ethnic community, it is clear that Dade County is multi-ethnic. While the primary groups are Blacks, Hispanics, and Non Latin Whites, the Hispanic population, for example, includes not only Cubans, but people from various parts of Central and South America, and both the Hispanic and

Black communities have members from Caribbean countries. Dade County has truly become a microcosm of the Western Hemisphere, and is a uniquely situated venue for allegations that a violation of the Voting Rights Act has occurred. It is also against this unique backdrop that the defendants contend that *Thornburg* cannot apply to this case.

The defendants contend that the *Thornburg* analysis does not apply to Dade County, and that they are otherwise entitled to judgment as a matter of law because no single ethnic group constitutes a majority. Indeed, the defendants note that the plaintiffs, when taken together, comprise a majority of the population, and of the registered voters. According to the latest count of Dade County's population and voter registration, the following facts exist: Non Latin Whites comprise approximately 37 percent of the population and 48.67 percent of the registered voters; Hispanics (including Hispanics born in United States) comprise approximately 43 percent of the population and 32.96 percent of the registered voters; and Blacks comprise approximately 20 percent of the population and 18.37 percent of the registered voters of Dade County. Affidavit of David C. Leahy at 2 (March 17, 1988).

The fact that together Blacks and Hispanics account for a majority of the Dade County population, however, will not block a grant of relief in this action. In *Zimmer v. McKeithen*, 485 F.2d 1297, 1300 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carrol Parish School Board v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976), the Fifth Circuit considered a vote dilution case

brought by Black citizens of East Carroll Parish, Louisiana seeking to overturn the at-large elections used for local police juries and the school board. At the time the suit was brought, black citizens comprised 58.7 percent of the population. The *Zimmer* court followed explicit Supreme Court precedent by stating that while population is a relevant factor in an apportionment case, access to the political process is the "barometer of dilution of minority voting strength." *Id.* at 1303; *see also Whitcomb v. Chavis*, 402 U.S. 124, 149-50, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363, 379-80 (1971); *White v. Regester*, 412 U.S. 755, 765, 93 S. Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973) (affirming a district court's finding of dilution of a minority group's vote despite their comprising a numerical majority of the population of that county). The defendants are asking the court to apply an unrealistically simple per se rule to a political process and political culture that cannot be characterized so neatly. Rather then espouse a rule such as, "Minority of population required," or "Minority of registered voters required," this court will apply the *Thornburg* test to the instant case to determine whether the plaintiffs have met their burden of proving a violation of the Voting Rights Act.

B. Thornburg's Three Necessary Preconditions

1. Sufficiently Large and Geographically Compact.

Blacks in Dade County constitute a sufficiently large and geographically compact minority group to constitute a majority in a single member district. This court agrees with the findings of a study conducted by the Metro-

Dade County Planning Department, that the approximately 381,000 Blacks living in Dade County reside within sufficiently concentrated and large regions of Dade County to constitute a majority in a single member district. *See* METRO DADE COUNTY PLANNING DEPARTMENT, POPULATION PROJECTIONS: RACE & HISPANIC ORIGIN – DADE COUNTY, FLORIDA 1980-2000, at Tables 1 & 3, Figures 4, 6 & 7 (June 1987). The defendants do not dispute the Black plaintiffs' ability to meet this first *Thornburg* precondition.

As to the Hispanics, the facts are less clear. Yet, this court is convinced that the approximately 811,000 Hispanics in Dade County, although living in a greater range of areas than their Black counterparts, are sufficiently large and live in sufficiently concentrated areas to meet *Thornburg's* first precondition. *See Id.* at Tables 1, 3 & 4, Figures 9 & 10; METRO-DADE COUNTY PLANNING DEPARTMENT, HISPANIC PROFILE 48-52 (Dec. 1986) (stating that Hispanics live in segregated residential patterns, although to a lesser degree than Blacks).

2. Politically Cohesive

Blacks in Dade County are politically cohesive. In reviewing the data of Professor Stowers submitted by the plaintiffs, the court has carefully considered the homogenous precinct analyses of all races involving Black candidates. In all races examined, the percentage of Black voters who voted for Black candidates was consistently high. Professor Stowers demonstrated that Black voters often voted overwhelmingly in favor of Black candidates who ran against either a Non Latin White or a Hispanic.

See generally Affidavit of Professor Genie Stowers (Feb. 11, 1988).

Dade County's Hispanics, however, are not politically cohesive. As a preliminary matter, in only two of eight races involving Hispanic candidates, did the Hispanic candidate carry their own ethnic group. In the 1980 County Commission runoff between Luis Morse (Hispanic) and Beverly Phillips (Non Latin White), the percentage of Hispanics that voted for Morse reached 64 percent. Affidavit of Professor Genie Stowers at 9 (Feb 11, 1988). In the 1986 runoff for Dade County Judge between Roy Gelber (Non Latin White) and Lucretia Granda (Hispanic), the homogenous precinct analysis reveals that Granda received 65 percent of the Hispanic vote. *Id.* at 16. In all other races where Hispanics ran for office, they received very little support from Hispanic voters. *Id.* at 6, (36%); 7, Table IV (44%); 8, Table V (34%); 12, Table IX (32%); 13, Table X (24%); 15, Table XII (43%). The court's analytical and statistical conclusion that Dade County's Hispanics are not politically cohesive is strongly supported by the political reality in Dade County. As discussed at the outset of this analysis, Dade County's Hispanic population consists of a multitude of different factions. As a member of this community for thirty-five (35) years, the undersigned has come to realize that one's place of national origin, and the circumstances under which he came to the United States, affects one's political views significantly. Many people came to Dade County after the governments of their native lands, especially Cuba and Nicaragua, were experiencing turmoil and revolution, and their varied experiences influence their political outlook greatly. For instance, Dade County is home to

many people who came here as a result of a communist revolution in their homeland, and others who fled the oppressive regimes of right-wing dictators. It is widely thought that each of these experiences tends to produce a different party affiliation in the individual. Thus, the political ideology of Dade's Hispanics is incapable of being neatly labelled. It is an aggregation of many different political views.

Under *Thornburg*, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Thornburg*, 478 U.S. at 51, 106 S. Ct. at 2767, 92 L.Ed.2d at 47. The court has examined the plaintiffs' submission of data on this issue, and against the harsh realities of these statistics, derived from Professor Stower's own analyses and definitions, her conclusions as to the political cohesiveness of Dade County's Hispanics are incorrect. For example, Professor Stowers concludes from the 1986 County Commission primary election between Raymundo Barrios (Hispanic), Betty Ferguson (Black), and Barry Schreiber (Non Latin White) that "Hispanic voters gave tremendous support to Barrios." Affidavit of Professor Genie Stowers at 13 (Feb. 11, 1988). Yet, Barrios only received 24 percent (or 23,039 votes) of the Hispanic vote, a figure not surprising given only 26, 590 votes were cast for Barrios in the election. *Id.* In other words, most of the votes that Barrios received were by Hispanic voters, but he did not receive most of the Hispanic votes cast. Had Barrios truly received the overwhelming support, the "almost perfect correlation," he probably would have won the election. Consequently,

the court finds that the plaintiffs have failed to show that Hispanics are politically cohesive.

3. Non Latin White Block Voting

A. Is there a Non Latin White Block Majority?

The third precondition that the plaintiffs must meet in order to overcome the threshold inquiries set forth in *Thornburg*, is that a white majority sufficiently votes as a bloc to be almost always able to defeat a minority's preferred candidate. *Thornburg*, 478 U.S. at 51, 106 S. Ct. at 2767, 92 L.Ed.2d at 47. This prong is often referred to as the crucial element to a Section 2 claim. *See e.g., Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 499 (5th Cir. 1987). The theoretical basis for the importance of this analysis is that, given the premise that minority and majority voters typically prefer different candidates, the majority will prevail to defeat the choices of minority voters, by virtue of its numerical superiority. Thus, it is imperative that the plaintiffs demonstrate that the Non Latin White community not only vote as a bloc, but that they are a voting bloc majority. Without a majority, Non Latin White voters cannot have the power to compromise the minorities' ability to elect their preferred candidates. After a review of all relevant pleadings, the court concludes that Non Latin Whites in Dade County are not a majority of the registered voters.

According to David C. Leahy, the Supervisor of Elections of Metropolitan Dade County, Non Latin Whites comprise approximately 48.67 percent of the registered voters of Dade County, while Hispanics and Blacks

account for approximately 32.96 percent and 18.37 percent, respectively, of Dade County's registered voters. Affidavit of David C. Leahy at 2 (Mar. 17, 1988). Plaintiffs, of course, object to the use of these statistics and direct the court's attention to their submission of Leahy's deposition as proof of the correct statistics. Indeed, Leahy stated that in October, 1987, Non Latin Whites comprised 55.6 percent of the registered voters, Hispanics comprised 26.4 percent, and Blacks made up 18 percent. Deposition of David C. Leahy at 9 (Nov. 30, 1987). There is an apparent inconsistency between these records, since Non Latin Whites cannot be both a majority and part of a plurality.

Leahy specifically stated in his deposition that Hispanics born in the United States were included under the Non Latin White category. *Id.* at 4. Thus, it is the use of this rule of construction in the October, 1987 deposition figures, but not in the March, 1988 affidavit, that produces the different result for Non Latin White and Hispanic registered voters. Plaintiffs claim that the court must consider Leahy's deposition testimony to the exclusion of his affidavit. The different set of registered voter statistics represents a difference in the use of operative terms or definitions; namely, whether Hispanics born in this country should be characterized as Hispanics or Non Latin Whites. As such, the court believes Leahy's deposition and affidavit represent two legitimate schools of statistical thought. This court finds it impractical and unrealistic to adopt a brightline rule grouping Hispanics born in the United States either apart from Hispanics as a whole, or as part of the Non Latin White population.

The degree to which a person of Hispanic ancestry identifies with, and is influenced by his Hispanic culture is a variable that is beyond statistical analysis. In Dade county in particular there may be Hispanics who spend almost their entire lives in "Little Havana," and others whose lives are spent completely apart from the culture, customs and language of the Hispanic community. In many cases, it takes several generations for a person to strike a balance between his identity with his homeland and his devotion to his adopted country. Some people may never reach that balance, while other may assimilate completely and immediately. Thus, the court's resolution of the issue of Non Latin White bloc voting must turn on whether that voting is legally significant, and not whether there is a Non Latin White voting bloc majority.

B. Is There Legally Significant Non Latin White Bloc Voting in Dade County?

The question raised under this aspect of *Thornburg's* third prong, is whether Non Latin White voters voting as a bloc for a Non Latin White candidate will usually defeat a minority candidate for County Commissioner, whether he be Black or Hispanic. *See League of Untied Latin American Citizens v. Midland Independent School District*, 812 F.2d 1494, 1502 (5th Cir. 1987)

The *Thornburg* Court acknowledged that there is no simple doctrinal standard to determine legally significant racial bloc voting. *Thornburg*, 478 U.S. at 55-58, 106 S. Ct. at 2769-70, 92 L.Ed.2d at 49-51. This court has considered carefully the evidence submitted by the parties, looking particularly for a pattern of racial bloc voting which

might be probative of legally significant polarization. The *Thornburg* Court's inability to agree on the requisite proof required to prove racially polarized voting – from which racial block voting is determined – makes resolution of this issue a difficult one.

The court has carefully reviewed Professor Stowers' affidavit, submitted to support their contention that Dade County experiences legally significant racial block voting. The court concludes from this analysis that the Non Latin White voting bloc is not legally sufficient. Rather, several factors, including hostilities between the minority groups, incumbancy, name recognition, candidate fitness, etc., all contribute to the plaintiffs' alleged political woes, and thus, plaintiffs have confused "losing" votes with "diluted" votes.

It is apparent from examination of the elections involving Black candidates that the plaintiffs have failed to prove legally significant Non Latin White block voting. In most races analyzed, the Black candidates' inability to attract additional support from the Hispanics was as much a reason for their loss as their inability to do the same with Non Latin Whites. Indeed, in the races involving Black candidates, the Non Latin White voters supported the Black candidates in a percentage proportion almost equal to Hispanics. *See* Affidavit of Professor Genie Stowers at 4, 12, 14, 17, 18. In elections involving Black candidates Betty Ferguson and Leah Simms, the Black candidate lost by a very small margin. *Id.* at 12, 14, 18. Moreover, in the majority of these races, the Black candidates were able to garner the support of nearly one-third of the Hispanics and the allegedly Non Latin White bloc majority. The conclusion from such close elections,

(sometimes involving a Black challenger against an incumbent) is that Dade County does not experience legally sufficient Non Latin White bloc for purposes of Section 2 of the Voting Right Act.

Although the degree of bloc voting that rises to the level of legal significance varies from district to district, if a Non Latin White voting bloc "normally will defeat the combined strength of minority support plus white 'cross-over' votes [it] rises to of the level of legally significant bloc voting." *Thornburg*, 478 U.S. at 56, 106 S. Ct. at 2770, 92 L.Ed.2d at 50. The court has discerned, and plaintiffs admit a keen hostility in fact exists between the minority groups. Transcript of First Oral Argument at 8-9 (January 27, 1988). Professor Stowers' affidavit shows that without exception, when a Black or Hispanic candidate is running against a Non Latin White candidate, the other minority group will vote for the Non Latin White. As noted above, Black candidates lost several elections by small margins. In these elections, had there been no hostility between Blacks and Hispanics, the election of the Black over the Non Latin White would have been all but guaranteed.

Of course, the election of a few minority candidates does not itself prevent a court from finding that minority votes are being impermissibly submerged into the Non Latin White majority. But the court's analysis goes far beyond merely recognizing minority successes, and concludes that Blacks are not suffering from the effects of a legally cognizant Non Latin White block majority.

The court reaches the same conclusion as to Hispanics' claim of racial block voting. In most races analyzed, the Hispanic candidate was not able to carry

his own ethnic group. Indeed, as discussed previously, in only two of eight races analyzed did the Hispanic receive more than 50 percent of the Hispanic vote. In all other races examined, the Hispanic candidate received only about one-third the support of all ballots cast by Hispanics. These results call into question the candidates' fitness to run, incumbancy of an opponent, campaign issues, etc. Moreover, the court once again observed a hostility in fact between the minorities.

The court concludes that the plaintiffs have failed to prove the existence of a Non Latin White bloc majority that usually defeats the election of the minority's preferred candidates. That is, the court in considering the totality of circumstances involved in Dade County has been unable to find legally significant Non Latin White bloc voting sufficient to sustain the Plaintiffs' burden of proving a vote dilution claim.

IX. Conclusion

The plaintiffs in this case have failed to satisfy the threshold inquiries necessary to establish a violation of Section 2 of the Voting Rights Act. Accordingly it is hereby:

ORDERED and ADJUDGED that the defendants' motion for summary final judgment is GRANTED, and because the plaintiffs are not entitled to judgment as a matter of law, their motion for summary judgment is DENIED. Summary Final Judgment is hereby entered for the defendants and against the plaintiffs.

DONE and ORDERED at the United States District Court, Miami, Florida this 5 day of October 1988.

/s/ Kenneth L. Ryskamp
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record

No. 90-1117

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1990

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Petitioners,

vs.

CARRIE MEEK, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in interpreting this Court's decisions on the appropriate application of summary judgment by reversing and remanding the district court's entry of summary judgment in favor of the Petitioners.

2. Whether the court of appeals erred in holding that the Hispanic and Black plaintiffs in this case are entitled to proceed with a claim under Section 2 of the Voting Rights Act by virtue of the undisputed fact that Hispanic and Blacks collectively constitute a majority of the population of Dade County.

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RESPONDENTS' BRIEF IN OPPOSITION

[1] The other respondents in this case are the Honorable James C. Burke, Honorable Xavier Suarez, Ralph Parkingham, Maurice Ferre, Pedro Jose Gonzales, Prisciliano Falcon, Orlando Urra, and the Honorable Victor DeYurre. Furthermore, pursuant to Judge Kenneth Ryskamp's order dated December 6, 1990, Betty Ferguson was granted leave to intervene and is now a plaintiff/respondent in this matter. Collectively, the respondents will be referenced as "Respondents" or "Meek."

Respondents respectfully oppose the petition for certiorari in this case because the decision of the Court of Appeals is consistent with the rulings of this Court and there is no conflict that has been created among the Circuits by the decision below. The petition for certiorari must also be denied because, contrary to the argument of the Petitioners, neither appropriate federal statutes nor applicable case law require that minority voters exhaust available legislative remedies before asserting a claim under the Voting Rights Act, 42 U.S.C. §1973.

STATUTE AND RULE INVOLVED

42 U.S.C. §1973. *Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation*

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of

their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Fed.R.Civ.P. 56 Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT

Because the Petitioners' Statement of the Case is premised on a mischaracterization of the procedural posture of this case and an inaccurate portrayal of the factual record, the Respondents are required to present their own statement of the procedural and factual record on which the decisions of the Court of Appeals and the District Court are premised.

1. Dade County, Florida, elects its Board of County Commissioners ("County Commission") from the county at-large. The County Commission is composed of a mayor and eight commissioners and, although the mayor may

live anywhere in the county, each of the eight commissioners must live within a different one of eight residence districts. All voters in Dade County vote for one candidate from each district, as well as for the mayor, in all primary and general elections. In sum, the elections to the County Commission are conducted both at-large and county-wide.

Dade County contains three major population groups: Blacks, Hispanics, and Non-Latin Whites. Of these three major groups, not one constitutes a majority of the county's registered voters. Blacks comprise approximately 20% of the total population and 18.37% of the County's registered voters. Hispanics comprise approximately 43% of the total population and 32.96% of the County's registered voters. Non-Latin Whites comprise approximately 37% of the total population and 48.67% of the registered voters. (R.2-90).

2. The Respondents, Black and Hispanic citizens and registered voters of Dade County, brought suit against Dade County alleging that the at-large system of electing the County Commission diluted the strength of Black and Hispanic voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973. (R.1-1).

The District Court, on cross-motions for summary judgment, held that the Respondents failed to establish certain elements required under the case law interpreting the Voting Rights Act, granted summary judgment for the Petitioners, and denied the Respondents' motion for summary judgment. The Court found that the Respondents had failed to show that Hispanics in Dade County are politically cohesive, thus failing to satisfy the second of

three elements of a Voting Rights Act claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986), and that the plaintiffs failed to meet *Gingles'* third element by failing to prove the existence of a Non-Latin White bloc majority that usually defeated the election of the minority groups' preferred candidates. (R.3-99-1).

As to the first prong enunciated in *Gingles*, that the plaintiffs show that they are sufficiently large and geographically compact minority groups to constitute a majority in a single-member district, the District Court found that the Respondents met this precondition. Among other items, the record contained the deposition of Charles W. Blowers, then Chief of the Research Division of the Metro-Dade Planning Department, which was submitted by the Respondents to establish the geographical compactness of Blacks and Hispanics in Dade County (R.2-69-1).

The Respondents also submitted answers to interrogatories propounded by Dade County which identified individuals who were to testify at trial and in support of the Respondents' claim under prong one of *Gingles*. At the hearing on the motions for summary judgment, counsel for the Respondents also handed the district court a chart which demonstrated that minority voters could conceivably elect two commissioners under a single-member district system. At least as to the Black plaintiffs, Dade County did not even dispute the Black plaintiffs' establishment of this first *Gingles* element. (R.3-99-16).

3. On appeal, the Eleventh Circuit reversed and remanded the case to the District Court. Judge Kravitch's opinion for the panel explained how the District Court

had erred in applying the appropriate legal standard regarding vote dilution, particularly as to the third element enunciated in *Gingles* that the plaintiff minority group must demonstrate that a white majority votes sufficiently as a bloc to allow it in the absence of special circumstances to defeat the minority group's preferred candidates.

Whereas the district court denied relief to the Respondents on the reasoning that other factors instead of white voting patterns contributed to the lack of electoral success for Blacks and Hispanics in Dade County, the Eleventh Circuit recognized "that the 'multi-ethnic' nature of Dade County differed from the simple majority/minority context contemplated by *Gingles*." (Resp. App. A12-A13). Thus, the existence of temporary coalitions of one minority group siding with the Non-Latin White plurality was held to be sufficient to create a permanent anti-minority majority which could, as a matter of law, require redress under the Voting Rights Act. The failure of Non-Latin Whites to constitute an electoral majority in Dade County proved to be irrelevant to the analysis of the Eleventh Circuit panel. (Resp. App. A21).

The panel remanded the case to the district court "for reconsideration in light of the principles enunciated here." The panel instructed the district court to determine, based on the substantive law enunciated in its opinion, whether Blacks or Hispanics were electing their preferred representatives under the present system and whether Blacks or Hispanics were harmed by the manner in which existing districts had been drawn. In the event that the Petitioners could show the election of preferred representatives by minority groups or the lack of any

impairment in minority representation by the present system's districts, the panel left open the possibility that "the district court could still conclude that the plaintiffs have not satisfied the three necessary *Gingles* requirements . . . " (Resp. App. A22-A33).

SUMMARY OF REASONS FOR DENYING THE WRIT

The mandate contained in the Court of Appeals' reversal of the district court's entry of summary judgment in favor of the Petitioners, considered in combination with the settled precedent of this Court, suggests that the Petitioners' request for the issuance of a writ of certiorari be denied.

Contrary to the claim of the Petitioners, the Respondents did come forward with evidence that established prong one of the *Gingles* analysis. This evidence, contained in deposition testimony, charts, and answers to interrogatories, falls squarely within the guidelines enunciated by this Court for a nonmovant meeting their burden in response to a summary judgment motion.

Similarly, the Petitioners' request for the issuance of a writ of certiorari, at this stage of the proceedings and on the issue of the applicable summary judgment burdens, is highly inappropriate. The Eleventh Circuit's reversal of the district court's entry of summary judgment was based on the panel's conclusion that the district court improperly applied the Voting Rights Act and relevant case law to the facts and evidence before it. To the extent that neither the district court nor the Eleventh Circuit even

addressed the summary judgment issue now urged upon this Court, consideration of these issues would contribute little to the ultimate resolution of this matter.

Finally, the hurdle that the Petitioners seek to place in front of the Respondents and others similarly situated, exhaustion of administrative and political remedies, is not supported by the intent of Congress with regard to the Voting Rights Act or any other remedial civil rights legislation.

REASONS FOR DENYING THE WRIT

1. The Decision Below Does Not Conflict With This Court's Case Law On the Issue of Summary Judgment

The Petitioners argue that the Eleventh Circuit's reversal of the district court's entry of summary judgment in favor of Dade County is "in direct conflict with this Court's 1986 trilogy of cases construing Fed.R.Civ.P. 56." The Eleventh Circuit opinion, the Petitioners argue, had the effect of placing an improper burden on the Petitioners to negate the Respondents' claim and thus contravened this Court's 1986 decisions in *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

The Petitioners' contentions are not only without legal support, but they flatly mischaracterize the district court's judgment in their favor as well as the Eleventh

Circuit's reversal of that judgment. The Petitioners, for example, state assuredly that:

> Because the County had pointed out by evidentiary materials that no genuine issue of material fact existed as to prong one of *Gingles*, because prong one was an essential element of respondents' case, and *because respondents offered absolutely no evidentiary materials whatsoever that addressed prong one, summary judgment was properly entered in Dade County's favor.*

(Pet. 13) (emphasis supplied).

In direct conflict with the contentions of the Petitioners, the Respondents did come forward with at least three forms of evidence directly related to prong one of *Gingles*.[2] First, the Respondents submitted "the deposition of Charles W. Blowers, Chief of the Research Division of the Metro-Dade Planning Department, for the proposition that both minority groups in Dade County reside in geographically compact areas." (Resp. App. A32). The Respondents also served the Petitioners with answers to interrogatories that identified the witnesses that the Respondents intended to call at trial for testimony regarding prong one. Finally, counsel for Respondents

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[2] In *Thornburg v. Gingles, supra*, this Court articulated the requirements that a plaintiff must establish under Section 2 of the Voting Rights Act. As to the first requirement, this Court noted as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.

478 U.S. at 50.

submitted to the district court, at the summary judgment hearing, a chart which displayed that Hispanic and Black citizens in Dade County constituted a majority of registered voters within two of the eight residence districts in Dade County.

Celotex Corporation v. Catrett, 977 U.S. 317 (1986), is also contrary to the Petitioners' claim and does not require that the Eleventh Circuit affirm the district court's judgment. Specifically, Justice White's concurrence opinion in *Celotex*, a 5-4 decision of this Court, directly rebuts the Petitioners' contention that *Celotex* requires a nonmoving party to present evidence to demonstrate that material facts are truly in dispute with respect to an issue on which the nonmoving party has the ultimate burden of proof.

The issue before the Supreme Court in *Celotex* was the type of showing necessary by a nonmoving party to avoid a summary judgment where the nonmovant would bear the burden of proof at trial. Justice Rehnquist wrote that, "[w]e do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously Rule 56 does not require the nonmoving party to depose her own witnesses." 477 U.S. at 326. In his concurrence, Justice White expounded upon this question of inadmissable evidence being used to avoid a summary judgment. Specifically, Justice White wrote:

> I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that a movant may rely on depositions, answers to interrogatories,

> and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence there cannot be a factual dispute. But the movant must discharge the burden the Rules put upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.
>
> A plaintiff does not need to initiate any discovery or reveal his witnesses unless required to do so under discovery Rules or by Court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.
>
> *Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not have been granted without Celotex somehow showing the named witness' possible testimony raises no genuine issue of material fact.*

477 U.S. at 328 (emphasis supplied).

In his dissent, with which Chief Justice Burger and Justice Blackmun joined, Justice Brennan observed:

> It is unclear what the Court of Appeals is supposed to do with this case on remand. Justice WHITE – who has provided the Court's fifth vote – plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the

> plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression to the contrary, Justice WHITE's understanding would seem to be controlling. Cf. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

477 U.S. at 329, n.1.

Petitioners have insisted upon a strict application of the standards set forth in *Celotex*. If the instant case is controlled as much by *Celotex* as it is by *Gingles*, then the reversal and remand of the summary judgment should not be disturbed.

In accordance with Justice White's concurrence in *Celotex*, summary judgment should not have been granted without the Petitioners somehow showing that the named witnesses' possible testimony raised no genuine issue of material fact. The Petitioners never addressed these witnesses or their potential testimony below, and for this reason alone their petition must be denied.

The complete absence of any *Celotex* summary judgment analysis from the Eleventh Circuit's opinion also speaks volumes as to the deficiencies of the Petitioners' claim. Both the district court and Eleventh Circuit opinions make mention of evidence submitted by the Respondents in support of prong one of *Gingles*, and the Eleventh Circuit even points out that "as to the first *Gingles* prong, we affirm the district court's conclusion that the plaintiffs have satisfied their burden." (Resp. App. A21.) It is inconceivable that such certainty on the part of both courts as to the evidence offered in support

of prong one can now be the product of *"absolutely nothing* that related to prong one" (emphasis supplied). The Petitioners' argument under *Celotex* and related decisions of this Court thus lacks any merit under either the facts at issue or the appropriate case law.

Finally, to the extent that the *Celotex* issues raised in the petition were not even addressed by the Eleventh Circuit, the panel's opinion is highly inappropriate for review at this time. Where, as in this case, a court of appeals reverses and remands the district court's entry of summary judgment for failure to apply the correct legal standards of the underlying substantive law, it is the substantive legal standards which are appropriate for review and not the effect of those standards on the possible outcome of the litigation.

2. Review by This Court Is Not Warranted In This Case Where Application of the Voting Rights Act Is Not Limited to Groups Who, Either Alone or Collectively, May Represent a Majority of the Population.

The Petitioners' final contention is that Section 2 of the Voting Rights Act does not apply and should not apply where, as in this case, it is undisputed that the Respondents "constitute a majority of the registered voters in Dade County, and as such are possessed of the unimpeded political ability to change the challenged electoral system via the referendum method provided in the Dade County Home Rule Charter." In essence, the Petitioners are asking this Court to institute the functional equivalent of an exhaustion of political and legislative remedies standard as a precondition to an action under Section 2 of the Voting Rights Act.

Endorsing the age-old wisdom that the best defense is a good offense, the Petitioners emphasize that the Eleventh Circuit, in rejecting this argument of the Petitioners, made this rejection "without citation to any supporting authority." The Petitioners, ironically enough, in support of this claim, only cite *dicta* from *Gingles* for broad statements about the goals of the Voting Rights Act, and cite this Court's statement in *Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S.Ct. 2493, 2497 (1978), that "the judiciary should defer to legislative plans submitted during the remedy stage of a Section 2 action."

The Petitioners' failure to address and distinguish *Zimmer v. McKeithen*, 485 F.2d 1297, 1300 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carrol Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083 (1978), cited by the district court, silently declaims the weakness of their position. In *Zimmer*, the Fifth Circuit allowed a vote dilution case brought by Black citizens to proceed even though Black citizens comprised 58.7 percent of the population within the jurisdiction at issue. Likewise, in *White v. Regester*, 412 U.S. 755, 765 (1973), this Court affirmed a finding of the dilution of a minority group's vote despite the minority group's majority population within the county at issue. *See also Monroe v. City of Woodville*, 819 F.2d 507 (5th Cir. 1987) (reversing summary judgment entered in favor of city despite city's contention that "the substantial black majority of Woodville's voting-age population prevents the district court from ordering relief under the Act").

As a further sign of the inherent weakness of their argument, the Petitioners have failed to cite to any portion of the Voting Rights Act or any civil rights legislation

where Congress intended that litigants exhaust their remedies under state law before seeking federal redress. To the contrary, 42 U.S.C. §1971(d) provides that the

> district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

This Court also should not, as a pure matter of policy, subscribe to the Petitioners' legally unfounded request that Respondents be required to exhaust the local referendum process before moving forward with their Section 2 claim. Dade County's election history strongly suggests that the Non-Latin White plurality can influence the electoral process to guarantee the defeat of any referendum election that might have the effect of empowering minority voters. Section 2 was specifically designed to remedy inequalities produced by electoral processes and the social and historical conditions of a community. Placing a blind reliance on this same electoral process fails to acknowledge the appropriate need for judicial intervention in this context.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX

Carrie MEEK, et al.,
Plaintiffs-Appellants,

v.

METROPOLITAN DADE COUNTY, et al.,
Defendants-Appellees.

No. 89-5146.

United States Court of Appeals,
Eleventh Circuit.

Aug. 17, 1990.

Various black and Hispanic citizens and registered voters of county brought suit against county alleging that "at-large" scheme for election to board of county commissioners violated Voting Rights Act by diluting their voting strength. The United States District Court for the Southern District of Florida, No. 86-1820-CIV-KLR, Kenneth L. Ryskamp, J., entered judgment for county, and appeal was taken. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) trial court erroneously determined that non-Latin white voters could not constitute a voting bloc sufficient to bar election of black candidates, without giving effect to the coalition between Hispanics and non-Latin whites which frequently formed to bar election of blacks; (2) trial court erred in asserting that Hispanics could not challenge "at-large" method of election because they had numerical majority of voters and could elect their candidates by increasing the percentage of registration; and (3) trial court erroneously determined that minority classes would be unable to elect more representatives under single-member district plan than under at-large scheme, as each group had a majority in only one of

eight residence districts from which members were currently selected at large, and each minority group was currently represented in one district.

Reversed and remanded.

Stephen M. Cody, Miami, Fla., for plaintiffs-appellants.

Murray A. Greenberg, Robert A. Duvall, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

KRAVITCH, Circuit Judge:

Carrie Meek and other plaintiffs appeal from the district court's grant of summary judgment in favor of Metropolitan Dade County, Florida ("the county"). The district court held that the plaintiffs failed to establish certain required elements of their vote dilution case, and therefore granted summary judgment for the defendants and denied the plaintiffs' summary judgment motion. Because the district court erred in applying the law regarding vote dilution, we reverse and remand.

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*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

BACKGROUND

The plaintiffs, Black and Hispanic citizens and registered voters of Dade County, brought suit against the county alleging that the at-large scheme for the election of the Board of County Commissioners, which is the legislative and governing body of the county, violated section two of the Voting Rights Act by diluting Black and Hispanic voting strength.[1] Although the county has an ethnically diverse population, the three major groups, as identified by the parties and the district court, are: Blacks, Hispanics, and Non Latin Whites. None of the groups constitutes a majority of the total number of registered voters. As the district court noted: "Non Latin Whites comprises approximately 37 percent of the population and 48.67 percent of the registered voters; Hispanics (including Hispanics born in the United States) comprise approximately 43 percent of the population and 32.96 percent of the registered voters; and Blacks comprise approximately 20 percent of the population and 18.37 percent of the registered voters of Dade County." *Meek v. Metropolitan Dade County, Florida*, No. 86-1820, slip

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[1] The plaintiffs also alleged a constitutional claim arising under the fourteenth and fifteenth amendments to the Constitution. To prevail on such a claim plaintiffs must prove that the electoral system to which they object is conceived or operated with a discriminatory purpose. *See City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). The district court here, however, found that the plaintiffs had failed to present any evidence of a discriminatory purpose. They have not pressed their constitutional arguments on appeal, and accordingly we do not address them further.

op. at 15 (S.D.Fla. Oct. 5, 1988) [hereinafter Order of October 5, 1988].

The County electoral system for county commissioners is part of a so-called "federated plan" that provides for the allocation of authority between the county and the metropolitan governments. The county commission is composed of a mayor and eight commissioners. Although the mayor may live anywhere in the county, each of the commissioners must reside in a different one of the eight residence districts. Each commissioner, however, must run for election county-wide. Thus, although the county is divided into various residence districts, the elections are conducted at-large and county-wide.

The plaintiffs' vote dilution claim was brought under section two of the Voting Rights Act as amended in 1982.[2] The Supreme Court in *Thornburg v. Gingles* stated that:

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[2] Section two, as codified, reads as follows:

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section B(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown

(Continued on following page)

> [t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multi-member districts and at-large voting schemes may " 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' "

478 U.S. 30, 47, 106 S.Ct. 2752, 2764, 92 L.Ed.2d 25 (1986) (citation and footnote omitted) (interpolation in original). The Court further explicated the requirements a plaintiff must meet in pursuing a section two vote dilution claim:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must

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(Continued from previous page)

that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.

42 U.S.C. § 1973 (as amended 1982).

> be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Gingles, 478 U.S. at 50-51, 106 S.Ct. at 2766-67 (footnotes and citations omitted; emphasis in original).

The Court further explained the causation threshold of *Gingles* as follows:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to

> elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:
>
> "To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates. . . . [This standard] thus would only protect racial minority votes from diminution proximately caused by the district plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55-66 (footnotes omitted; emphasis added).

Gingles, 478 U.S. at 50, 106 S.Ct. at 2766 n. 17.

While the full contours of *Gingles* have not been agreed upon by this circuit, it is clear that the plaintiff must establish the three core *Gingles* factors in order to prevail on a vote dilution claim. *See Solomon v. Liberty County*, 899 F.2d 1012, 1017-21 (Kravitch, J., specially concurring), 899 F.2d at 1037 (Tjoflat, C.J., specially concurring (11th Cir.1990) (evenly divided en banc court).

The district court's order granting summary judgment in favor of the county held that the plaintiff's had not established that the Non Latin White bloc voting was "legally sufficient" because the plaintiffs had not proved "the existence of a Non Latin White bloc majority that usually defeats the election of the minority's preferred

candidate."[3] The district court reasoned that where Non Latin Whites did not constitute a majority, Non Latin White bloc voting could not, through numerical superiority, defeat the choice of minority voters.

After the plaintiffs filed a motion to alter and amend the judgment, the district court, albeit conceding that it had erred in its understanding of the statistical data, issued an opinion denying the motion. The district court found that Hispanics were in fact politically cohesive, but nevertheless the district court refused to alter the judgment because the plaintiffs still had not proved the third *Gingles* factor of legally significant Non Latin White bloc voting that caused defeat at the polls for the minorities' preferred candidates.

JURISDICTION

The county contends that we lack jurisdiction because the plaintiff-appellants failed to give timely notice of appeal. We disagree. A clerk in the district court provided plaintiffs' counsel with contradictory information concerning the date upon which the order denying the plaintiffs' motion to alter the judgment was entered. The clerk's statement to counsel led him to believe that the time for appeal under Fed.R.App.P. 4(a) had already expired, although in fact counsel still had two remaining

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[3] In the district court's order of October 5, it held that Hispanics were not politically cohesive. In the subsequent order issued in response to the plaintiffs' motion to alter and amend the judgment, the district court, upon reexamination of the statistical evidence, found that Hispanics were politically cohesive.

days to file a notice of appeal. Had counsel been informed accurately, he would have been able to file a timely notice of appeal. He was led, however, by the district court clerk's statement to believe that his only avenue was through Fed.R.App.P. 4(a)(5), which permits the district court, upon a showing of excusable neglect or good cause to extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a). Fed.R.App.P. 4(a) establishes the period for timely appeal in a civil case.

We have noted previously that the addition of the "good cause" language "indicates that the standard should be interpreted flexibly." *Davis v. Page*, 618 F.2d 374, 378 (5th Cir.1980) (citation omitted), *aff'd in part and rev'd in part on other grounds*, 640 F.2d 599 (1981) (en banc),[4] *vacated on other grounds*, 458 U.S. 1118, 102 S.Ct. 3504, 73 L.Ed.2d 1380 (1982). We hold that counsel's justifiable reliance on the district court clerk's erroneous information provides "good cause" under the unique circumstances of this case. Furthermore, this court, rather than "secondguess" the district court, defers to the district court so long as its decision does not constitute an abuse of discretion. *Id.; see also Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1063 (5th Cir.1979). Accordingly, we conclude that the extension of time was properly granted, the notice of appeal was timely filed, and that we have jurisdiction.

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[4] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

SUMMARY JUDGMENT AND STANDARD OF REVIEW

The county contends that it was entitled to summary judgment as a matter of law because the plaintiffs failed to "establish the existence of an essential element [of their case], and on which [they] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The district court agreed that the plaintiffs had failed to satisfy the third *Gingles* prong.

Generally, in summary judgment we review the district court's legal conclusions de novo. We are mindful that after trial of a vote dilution case, "the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781. Nevertheless, we may "correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982))). in this case, the district court's conclusion was premised on an erroneous application of the law, and we therefore reverse for application of "the governing rule of law."

APPLYING GINGLES

As noted above, this circuit is divided on the proper application of *Gingles*. In *Solomon*, the evenly divided court was united in stating that a plaintiff, at a minimum, must satisfy the three core *Gingles* factors. The en banc

court divided on the question of whether proof of the three core *Gingles* factors was sufficient and whether a defendant could raise as a defense the lack of racial bias in the community. As the court is of the unanimous opinion that the three core *Gingles* factors are *necessary* prerequisites to a vote dilution case, *see Solomon*, 899 F.2d at 1017-18 (Kravitch, J., specially concurring), 899 F.2d at 1034-36 (Tjoflat, C.J., specially concurring), we will discuss these requirements first as our resolution of the issues concerning the core factors may moot further concerns.

The heart of the dispute relates to the ability of the Non Latin White bloc usually to defeat the minority group's choice. The district court did not decide whether Non Latin White voters constituted a majority of the Dade County registered voters as the district court chose to decide "the case on other grounds. . . . " *Meek v. Metropolitan Dade County, Florida*, No. 86-1820, slip op. at 9 (S.D.Fla. Nov. 6, 1988) [hereinafter Order of November 6, 1988]. The ground relied upon by the district court was that the Non Latin White voting bloc, the existence of which the district court "cannot deny," *id.* at 8, did not *cause* the election losses suffered by Black and Hispanic voters. The court stated that to support the third prong of the *Gingles* test, "it is imperative that the plaintiffs demonstrate that the Non Latin White community not only vote [sic] as a bloc, but that they are a voting bloc majority." Order of October 5, 1988 at 20.

The district court's overall conclusion, common to both Blacks and Hispanics, that the Non Latin Whites did not cause the loss of candidates of either group rested on differing grounds as to each group. The district court

applied different rationales to the vote dilution claim of Blacks and Hispanics.

Dilution of the Black Vote

In its first order, the district court, noted that:

> a keen hostility in fact exists between . . . [Blacks and Hispanics. The expert's] affidavit shows that without exception, when a Black or Hispanic candidate is running against a Non Latin White candidate, the other minority group will vote for the Non Latin White. . . . In these elections [where Black candidates lost by a small margin], had there been no hostility between Blacks and Hispanics, the election of the Black over the Non Latin White would have been all but guaranteed.

Order of October 5, 1988 at 24 (record citation omitted).

In its second order, the district court reiterated that "one of the many conceivable reasons why Blacks in Dade County have difficulty in electing their preferred candidates [is that] Hispanics do not vote for them." Order of November 6, 1988 at 8. The district court then attributed Black losses, not to the white voting bloc's refusal to vote for the Black candidate, but to "[o]ther important factors includ[ing] lack of Hispanic support, name recognition, incumbency, low voter turnout, etc." The district court concluded that because in that court's view the plaintiffs had "failed to satisfy the causation element of *Thornburg [v. Gingles]*'s third prong, their claim of vote dilution must fail." *Id.*

The district court erred in its application of the causation prong of the *Gingles* analysis. The district court

was aware that the "multi-ethnic" nature of Dade County differed from the simple majority/minority context contemplated by *Gingles*. The district court, noting the hostility between Blacks and Hispanics, implicitly recognized that the hostility created a permanent anti-minority majority in Dade County, with Blacks siding with Non Latin Whites against Hispanic candidates, and Hispanics siding with Non Latin Whites against Black candidates. The district court, however, did not attribute to this phenomenon the appropriate legal significance.

Keeping in mind the Court's admonition that "[t]he essence of a § 2 claim is that a certain law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representative[,]" we consider the "functional effect" of the existing system. 478 U.S. at 48, 106 S.Ct. at 2765 n. 15. Here the social reality is that Black and Hispanic voters are hostile toward each other in the electoral arena. Similarly, Non Latin Whites are politically cohesive and tend not to vote for Hispanics or Blacks. The district court concluded that because Non Latin Whites by themselves could not block the electoral success of Blacks, Blacks had not succeeded in proving that Non Latin Whites caused the defeat of "minority" voters. The district court erred in failing to recognize that coalitions can form a legally significant voting bloc, and that a coalition of Hispanics and Non Latin Whites could form the relevant majority voting bloc for the purpose of the third *Gingles* factor.

Dilution of the Hispanic Vote

As to Hispanics in particular, the district court apparently concluded that Hispanic candidates did not lose because they lacked Black support; instead, Hispanic candidates lost because Hispanics were under-registered to vote in proportion to their population. The district court reasoned:

> the fact that the Hispanic population in Dade County is actually larger in size than any other group in the county including Non Latin White, that Hispanics could also be the largest segment of registered voters with an effective registration drive, and that it is conceivable that Non Latin Whites are not even a majority of the registered voters in Dade County, all combine to defeat the Hispanic defendants [sic] claims that their votes are being impermissibly diluted by a legally significant Non Latin White voting bloc.

Order of November 6, 1988 at 9-10.

In considering the import of the large population percentage of Hispanics, the district court in its initial order noted the authority of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). In *McKeithen*, the en banc court *reversed* the trial court and panel decisions, which had "held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish." 485 F.2d at 1300. Hence, the district court here properly rejected the county's contention that *Gingles* could not apply at all in

a setting where the Non Latin White bloc did not constitute a majority of the total population. Nevertheless, the district court interpreted the third *Gingles* prong as requiring the plaintiffs to prove that the Non Latin White bloc in and of itself could defeat the minority choice.

The district court concluded that Non Latin White bloc voting did not cause the defeat of Hispanic candidates; rather, the failure of Hispanics to register to vote was the reason Hispanics lost, i.e., if Hispanics registered and voted, their electoral success would be guaranteed. Critical to the district court's conclusion was its finding that Hispanics could constitute "the largest segment of registered voters with an effective registration drive." Order of November 6, 1988 at 10. There was, however, no evidence before the district court of voting age populations. The only evidence related to total population and numbers of registered voters.[5] We must, therefore, conclude that the district court erred in concluding that Hispanic underregistration causes electoral losses as there is no evidence of the relative numbers of voting age persons in the various voting blocs.[6]

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[5] *See, e.g.*, Leahy deposition. Our search of the record has not revealed a source of the district court's assertion, and we note that the county claims that there is no evidence in the record of voting age population.

[6] The district court's statement that Hispanics constitute the largest population group is irrelevant. Given the absence of any evidence as to numbers of voting age persons, the district court's statement that Hispanics could constitute the largest portion of registered voters is mere speculation. Similarly, the

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We conclude that Hispanics lose because Non Latin White candidates receive more racially polarized votes than Hispanic candidates. Furthermore, given the polarization of voting and the hostility between Blacks and Hispanics, the fact that Hispanics constitute no more than approximately 32.96% of registered voters[7] leads to the conclusion that Non Latin Whites and hostile politically cohesive Blacks form the remaining majority. Non Latin Whites alone are 48.67% of the registered voters.[8] In light of the district court's finding that Blacks and Non Latin Whites are politically cohesive and tend to vote against Hispanic candidates, such a setting is ripe for a vote dilution claim, and the Hispanic plaintiffs have demonstrated that third *Gingles* factor, that they usually are denied the opportunity to elect their preferred representatives because of an opposing voting bloc.

The County's Contentions

The county argues that the plaintiffs fail under *Gingles* because they cannot satisfy their burden of demonstrating that the plaintiff minority class will be able to elect more representatives under single-member district plan than it now elects under the at-large scheme. In

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district court's assertion that "it is conceivable that Non Latin Whites are not even a majority of the registered voters in Dade County" is entitled to no weight as we cannot decide cases based on what may be "conceivable."

[7] Leahy affidavit of March 17, 1988 (Leahy is Supervisor of Elections of Metropolitan Dade County).

[8] *Id.*

support of its claim, the county points to the first *Gingles* factor, which requires the minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates." 478 U.S. at 50, 106 S.Ct. at 2766 (footnote omitted).

We agree with the county that if the plaintiffs would have no greater opportunity to elect their preferred representatives under a single-member district plan, then they cannot show that the at-large scheme is causing their inability to elect their preferred representatives. *Gingles* addresses not only a group's ability to elect a satisfactory candidate (that is, a candidate for whom the minority voter is *willing* to cast a vote), but the group's ability to elect its *preferred* candidate. The county assumes that if a Black consistently has been elected from district three, then Blacks have been successful in electing their preferred candidate. Further, the county assumes that the only relevant inquiry relates to the ability of Blacks and Hispanics to elect representatives based on the residency populations as those districts are now drawn. Neither assumption, however, is necessarily true.

Relying on existing residence district borders, the county states that Hispanics and Blacks are a majority of registered voters only in districts two and three respectively, that a Hispanic and a Black have represented those respective districts for at least the past seven years, and concludes that neither Hispanics nor Blacks could attain

any greater electoral success by switching to single-member districting because Blacks and Hispanics would still only elect one representative each.

There are two hidden premises in the county's argument.

Existing District Lines

First, the county assumes that no other districts could be drawn that would permit Blacks or Hispanics to elect more representatives than they do now. The county's reliance on the makeup of the existing districts is misplaced. At issue is whether the population distribution could be differently apportioned among redrawn districts such that minority Black and Hispanic voters have greater representation. According to the Supreme Court, "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17. In *Thornburg v. Gingles*, the district court did not simply count the votes within the existing districts, but considered whether new districts could be drawn that would enable Blacks to enjoy greater representation more in keeping with their numbers in the population. *See Gingles*, 478 U.S. at 38, 106 S.Ct. at 2760.

The district court should consider whether single-member districts could be drawn which would permit Blacks and Hispanics equal opportunity to elect representatives of their choice. That is the baseline against which the existing at-large system should be measured. We agree with the observation made by Chief Judge Tjoflat in

his now-vacated panel opinion in *Solomon* that "[o]f course, the resulting single-member electoral system must achieve a more proportional representation of minorities than did the previous multi-member system." *Solomon v. Liberty County*, 865 F.2d 1566, 1572 n. 5 (11th Cir.1988) (vacated). The district court, however, did not address whether alternative districts could be drawn such that Blacks would have the opportunity to elect one representative from a "safe" district and also have the possibility of occasionally electing a representative from a more marginal "swing" district. Section two does not provide a guarantee of proportional representation. It does, however, require equal opportunity to participate and elect representatives of the minority group's choice.

Preferred Representatives

Second, the county assumes that the Hispanic and Black representatives elected from districts two and three are the "*preferred* representatives" of the respective minorities. That is not necessarily so.

Whether the candidate elected is the preferred candidate of a particular minority group turns on more than the candidate's race. The at-large scheme could cause the candidate elected from the Black and Hispanic residence district to be someone who is less responsive to the particular needs of an insular community than would be the case under a single-member district structure. Naturally, the less responsive candidate would not be the "preferred" candidate when evaluated against a single-member district baseline and the candidate who would be elected under that system. For example, in an at-large

system, the candidates from a Black or Hispanic residence district who hold themselves forth for at-large election may not be the preferred candidate of the minority group, but rather may be a candidate who is perceived as viable *given* the at-large election scheme. *Cf. Gingles*, 478 U.S. at 76 n. 37, 106 S.Ct. at 2779 n. 37 (success of Black candidate not always attributable to support in the Black community). Although the representative from district three, by way of example, is in fact Black, that does not mean that particular candidate is the preferred candidate of Black voters; the candidate may be a person for whom Blacks are willing to vote when the alternative would be the election of a White candidate, but that does not mean that the same candidate would be elected in a single-member district plan. In contrast, under a single-member district plan, a candidate who, because he or she is more responsive to Black concerns, is the preferred candidate of Blacks could be elected even though he or she is unacceptable to White voters and would not be elected under an at-large scheme. In short, the at-large scheme may cause the Black candidate to be someone other than the preferred candidate of Black voters. That a candidate is of the race of the group is not dispositive; the legal standard is whether the candidate is the preferred candidate of the minority group.

Whether a given minority candidate who has long enjoyed electoral success is the preferred representative requires appraisal of local facts within the ken of the district court and best left to it.

Alternative Avenues Open to Minorities

At oral argument, the county objected to any judicial involvement on the ground that Blacks and Hispanics by joining together have sufficient political clout to change the electoral system by instituting a referendum as permitted by Florida law. Assuming that such a referendum is available, the plaintiffs nevertheless have the right to pursue their judicial remedy as provided by federal statute, rather than embarking on the task of effecting change through the referendum method. Minorities have resorted frequently to the federal courts for vindication of their rights. Moreover, we note that minorities may be less successful at organizing and orchestrating voting campaigns than are other groups, and may therefore prefer the statutory remedial scheme. Finally, the fact that a minority group may perceive itself as less successful in the political arena may cause diminished participation in such a referendum. Regardless of the viability of alternative avenues, the plaintiffs are entitled to enjoy their statutory right to seek redress in the federal courts, and we cannot deny it to them.

Summation

In sum, as to the first *Gingles* prong, we affirm the district court's conclusion that the plaintiffs have satisfied their burden. The second prong is not in dispute. As to the third *Gingles* prong, we conclude that the district court's legal analysis was premised upon legal error.

TASK ON REMAND

As the district court here denied relief based on its erroneous interpretation of the third *Gingles* factor, we remand for reconsideration in light of the principles enunciated here. *See Gingles*, 478 U.S. at 78-79, 106 S.Ct. at 2781. Specifically, the district court must decide whether Blacks or Hispanics have thus far usually elected preferred representatives. The court should also consider whether Blacks or Hispanics are impaired in their ability to elect representatives of their choice by the manner in which the voting districts are now drawn. This case does not require us at this juncture to reenter those disputed issues that divided the en banc court in *Solomon*. Under the *Gingles* principles enunciated here, the district court could still conclude that the plaintiffs have not satisfied the three necessary *Gingles* requirements: the district court could find that Blacks and Hispanics have elected their preferred representatives, and that the existing districting plan does not impair the ability of either group to elect representatives of its choice. In that event the issue of affirmative defenses would not be reached. If the district court found the plaintiffs to have satisfied the three *Gingles* factors, it appears on the facts of this case, where the district court has found the existence of racial hostility between Blacks and Hispanics driving electoral results, that under either view of the *Solomon* en banc court, the plaintiffs might be entitled to relief. Given the posture of this case, we decline to assume the existence of facts in order to apply the law hypothetically. Further, the Supreme Court has made clear that the district court should analyze the facts in the first instance. We therefore

decline to reach issues not necessary to the decision of this case.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-1820-CIV-RYSKAMP

CARRIE MEEK, et al.,

Plaintiffs,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Defendants.
_____/

SUMMARY FINAL JUDGMENT

THIS CAUSE is before the court upon the motions of the defendants and plaintiffs for summary final judgment. The court, having carefully reviewed the motions, all supporting and opposing memoranda of law, the affidavits, admissions and depositions on file, and having heard extensive oral argument of counsel in this action, hereby enters summary final judgment in favor of the defendants for the reasons set forth below.

I. INTRODUCTION

The plaintiffs contend that the present system of electing members to the Dade County Board of County Commissioners impermissibly dilutes the voting strength of both Black and Hispanic voters, deprives them of their rights under the fourteenth and fifteenth amendments to the United States Constitution, and is also violative of their statutory rights provided by Section 2 of the Voting Rights Act of 1965, as amended, 96 Stat. 134, 42 U.S.C.

§1973) (1982).[1] The plaintiffs predicate their action on the decision of the Supreme Court of the United States in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The plaintiffs seek (1) a declaration that the use of at-large staggered term elections for the nomination and election of members of the Dade County Board of County Commissioners violates Section 2 of the Voting Rights Act; (2) the entry of a permanent injunction preventing the defendants from conducting, supervising, or certifying the results of any further at-large elections to the Board of County Commissioners; (3) an order requiring the defendants to implement a system of electing members to the Board of County Commissioners

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[1] Section 2 of the Voting Rights Act reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. §1973(a)&(b)(1982)

which affords plaintiffs the opportunity to elect representatives of their choosing, and which does not dilute minority voting strength; and (4) costs and reasonable attorneys fees.

As a threshold issue, the defendants contend that the lack of the existence of a majority group among the population of Dade County renders Section 2 of the Voting Rights Act inapplicable to Dade County. In addition to this threshold argument, the defendants submit that the present at-large system of electing Commissioners neither dilutes anyone's votes, nor results in any abridgement of the voting rights of either Black or Hispanic voters in Dade County, so as to constitute a denial of their rights to equal access to the political process, and to elect representatives of their choice.

II. THE PARTIES

Plaintiffs Carrie Meek, James C. Burke, George F. Knox, and Ralph Packingham are black adult citizens and registered voters in Dade County. Plaintiffs Xavier Suarez, Maurice A. Ferre, Pedro Jose Gonzalez, Victor De Yurre, Prisciliano Falcon, and Orlando Urra are Hispanic citizens and registered voters in Dade County, as well. Defendants are Metropolitan Dade County, and Dade County Board of County Commissioners, David Leahy, Supervisor of the Dade County Elections Department, and the members of the County Canvassing Board.

III. Dade County Commission: Election and Structure

The Dade County Board of County Commissioners is the legislative and governing body of the county. Dade County Charter at §1.01. The Board is composed of nine members: the Mayor and eight Commissioners. The Mayor is elected by electors of the county at large, and serves as a member of the Board. The Mayor has no greater power than any other Commissioner, except that the Charter provides that the Mayor serves as Chairman of the Board. The Charter also directs the mayor to prepare and deliver a report on the state of the County, prepared after consultation with the County Commissioners and the County Manager. The County Manager, appointed by the full County Commission, is the chief executive officer, and head of the administrative branch of the county government.

Unlike the Mayor, who may reside anywhere, County Commissioners are required to run from designated districts. The Charter requires that from "each of eight districts there shall be elected by the qualified electors of the county at large a County Commissioner." *Id.* at §1.04(1).

The Mayor and the Commissioners are each elected to four year terms. The terms of the Commissioners are staggered; that is, four Commissioners are elected every two years. Candidates for County Commissioner must be elected by a majority of the votes cast. The Charter provides that "[i]f no candidate receives a majority of the votes cast there will be a runoff election at the time of the state second primary election between the two candidates receiving the highest number of votes. Should a tie result, the outcome shall be determined by lot." *Id.* at §2.01(B).

Vacancies on the Board can be filled by a special election or, until the next county-wide election, by a majority vote of the remaining members of the Board.

IV. Constitutional Claims

In order to prevail on their constitutional claims, the plaintiffs must establish that the present method of electing Commissioners is being maintained for a discriminatory purpose. *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980). While the Complaint, at paragraph 29, alleges such a discriminatory purpose, it does not appear from the written filings or oral arguments that the plaintiffs are pursuing these claims. There has been no evidentiary showing of such a discriminatory purpose. Accordingly, plaintiffs' constitutional claims must fail.

V. The Standard in Vote Dilution Cases

The fifteenth amendment to the Constitution of the United States guarantees each citizen a racially unconditioned right to vote. Upon its finding that judicial remedies for violations of this right were inefficient and often inconsistent, Congress enacted the Voting Rights Act of 1965. 42 U.S.C. §1973 et seq. (1982); *see South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966) (upholding the constitutionality of the Act). The Supreme Court of the United States initially interpreted Section 2 of the Act to require plaintiffs seeking the Act's protection to prove purposeful discrimination on the part of state or local governing bodies, charged with administering public elections. In *City of*

Mobile v. Bolden, the court held that a state legislative apportionment plan, which utilized at-large elections or multiple representatives from a single district, could not be held violative of the Act absent a showing of such discriminatory purpose. 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980); *see also City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L.Ed.2d 119 (1980) (finding that Congress had the power under the fifteenth amendment to prohibit electoral patterns that were not intentionally discriminatory).

The *Mobile* and *Rome* decisions prompted Congress to amend the Voting Rights act, so that courts would look more toward discriminatory effects, and less toward discriminatory intent. In addition to codifying this "results test," Congress set forth a series of factors that might be probative of a Section 2 violation.[2] These "Senate Factors" were attached to the bill that amended section 2, in order to assist courts in resolving the salient question raised by section 2 plaintiffs: "Whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." *Thornburg*, 488 U.S. at 44, 106 S. Ct. at 2763, 92 L.Ed.2d at 43.

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[2] The *Thornburg* Court shaped the most compelling elements of the Senate Factors into a three part test, which the plaintiffs in this case have failed to meet. Had these preconditions been satisfied, the court would have then analyzed the statistics and other evidence submitted in the context of these nine factors. For a complete listing of the Senate Factors, *see Thornburg*, 478 U.S. at 36-37, 106 S. Ct. at 2759-60, 92 L.Ed.2d at 38.

The Court applied the 1982 amendments for the first time in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 92 L.Ed.2d, 25 (1986). The *Thornburg* Court affirmed a district court's ruling that a North Carolina redistricting plan violated the amended Section 2. The court also set forth detailed legal standards for adjudicating Section 2 claims.

As a preliminary matter, the court denied plaintiffs the benefits of any presumptions or per se tests in prosecuting their Section 2 claims. The court refused to find certain electoral devices per se violative of Section 2, refused to bestow upon any group a right to proportional representation, and required plaintiffs to prove the existence of any racial bloc voting. *Id.* at 46, 106 S. Ct. at 2764, 92 L.Ed.2d at 43-44. What the court did do, however, was mold the Senate Factors into three necessary preconditions for the establishment of a Section 2 violation. *Id.* at 48-51, 106 S. Ct. at 2765-67, 92 L.Ed.2d at 45-47. After *Thornburg*, the Senate Factors are to be used directly only after each of the three preconditions are met. *See also Carrolton Branch of the National Association for the Advancement of Colored People v. Stallings*, 829 F.2d 1547 (11th Cir. 1987).

First, a Section 2 plaintiff must be part of a minority group that is sufficiently large in size, and geographically compact, that it comprises a majority within a single-member district. A minority group without this concentrated strength will not be heard, as it is clear that the mechanism by which representatives are elected cannot be the reason for the group's inability to elect its chosen representative. A group must have the potential to win, before it can claim that the system is responsible for that

potential not being fulfilled. Second, the minority group must be able to show that it politically cohesive. Without a demonstration that the minority group will vote as a unit, rather than as factions, a Section 2 cause must fail. Finally, the minority must prove that the majority votes as a bloc, usually to defeat the minority's preferred candidate. The court went on to say that if the majority's success is practically certain, this bolsters a claim of vote dilution, and negates a defendant's arguments that a majority win may be the exception, and not the rule.

In evaluating the plaintiffs' claim of vote dilution, this court is charged with making a realistic consideration of the totality of the circumstances, and to determine, whether the political process is open to minority voters. This determination requires "an intensely local appraisal" of the facts and allegations of each particular case. *Thornburg*, 478 U.S. at 79, 106 S. Ct. at 2781, 92 L.Ed.2d at 64-65. In the pages that follow, the court has attempted to point out the uniqueness of Dade County as the setting for a vote dilution claim. The court wishes to emphasize that its responsibility is not to decide what is best for the citizens of Dade County. Rather, it is the duty of this court to determine whether the plaintiffs in this case have sufficiently proven that the defendants have violated an Act of Congress, as interpreted by the Supreme Court of the United States.

VI. Plaintiffs' Case in Favor of Vote Dilution

The plaintiffs submit that the present at-large electoral system for electing members of the Board of County Commissioners impermissibly dilutes the voting strength

of Blacks and Hispanics in Dade County, Florida in violation of Section 2 of the Voting Rights Act. The plaintiffs state that the county's at-large voting procedures result in an abridgement and denial of the plaintiffs' voting rights on account of race or membership in a language minority. According to this view, the electoral system allows the Non Latin White majority, voting as a bloc, to exclude from office candidates supported by the Black and Hispanic minority groups. The plaintiffs contend that in cases of both Blacks and Hispanics, the three necessary preconditions set forth by the Supreme Court in *Thornburg* to establish a vote dilution claim have been met.

As to the first prong of the *Thornburg* test, the plaintiffs submit the deposition of Charles W. Blowers, Chief of the Research Division of the Metro-Dade Planning Department, for the proposition that both minority groups in Dade County reside in geographically compact areas. According to Blowers, census tracts that contained 90 percent of the Blacks in Dade County contained only 10 percent of Non Latin Whites; census tracts that contain 90 percent of the Hispanics in Dade County contain less than 50 percent Non Latin Whites. In addition, the plaintiffs state that registered voters among Blacks and Hispanics are geographically compact. As of March 1988, County Commission District 2 was composed of 54.1 percent Hispanic voters and County Commission District 3 was composed of 61.1 percent Black voters.

The plaintiffs also contend, in support of the second prong, that each of the minority groups is politically cohesive. In support, the plaintiffs cite to the affidavit of Genie Stowers, Professor of Political Science and Public

Affairs at the University of Alabama at Birmingham. Professor Stowers examined fifteen elections held between 1976 and 1986 in Dade County. She concluded, based upon homogenous precinct and bivariate regression analyses, that there was a consistent relationship between the race or ethnicity of the voter and the vote cast for minority candidates, reflecting that, as a group, they are politically cohesive. Affidavit of Professor Genie Stowers at 3 (Feb. 11, 1988). In each of the races examined, Professor Stowers concluded that there was a strong positive correlation between the presence of Black or Hispanic voters in precincts, and the support shown for the candidates that belonged to those groups.

Finally, as to the third prong of the *Thornburg* test, the plaintiffs submit that Dade County's Non Latin White majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidates. Again, the plaintiffs rely on the analysis of Professor Stowers to prove this point. Relying on the same data used to support the conclusion that Blacks and Hispanics are racially polarized, Professor Stowers concludes that Non Latin White voters consistently voted as a bloc against minority candidates when there was a Non Latin White candidate in the race.

VII. Defendants' Case in Rebuttal

In support of their case for summary judgment, the defendants assert that Dade County does not present the usual setting for a challenge to an at-large election system. As in *Thornburg*, the more typical backdrop involves a community composed of a large Non Latin White

majority and a small, discrete Black minority. In contrast, the defendants characterize Dade County as a tri-ethnic community in which no segment of the population constitutes a majority; Hispanics comprise 43 percent, Non Latin Whites comprise 37 percent, and Blacks make up 20 percent of the population. The defendants maintain, therefore, that the *Thornburg* analysis does not apply to Dade County, and that they are otherwise entitled to judgment as matter of law because no single ethnic group constitutes a majority. Indeed, the defendants note that together the plaintiffs comprise a majority of the population, as well as of the registered voters. According to the defendant, the plaintiffs do not dispute that the existence of a bloc voting majority is essential to a vote dilution claim. Rather, the plaintiffs counter that if Hispanics who were born in this country are added to the Non Latin White population, then the aggregate will constitute a majority of the pool of registered voters. The defendants respond that the plaintiffs have neither provided any evidence or legal authority to support their contention that Hispanics born in this country should be aggregated with Non Latin Whites in order to constitute a majority of registered voters, nor have they made the required showing for using registered voters as the relevant population in a vote dilution claim.

The defendants submit that no single racial or ethnic segment constitutes a majority in Dade County, and blame Hispanics' apathy for their underrepresentation on the Commission. At oral argument, the defendants contended that if Hispanics, the largest segment of Dade County's population, registered and voted, then they

would solve their political problems. Transcript of Hearing at 23 (Jan. 27, 1988). The defendants argue that if members of an ethnic group fail to register and vote because of their own inaction, as opposed to any impediment attributable to the electoral structure, they cannot be heard to complain about vote dilution.

The defendants contend that Blacks have been able to elect candidates to public office. They cite to the fact that in the instant case, there was continuously been a Black County Commissioner for the past twenty-five years. If there were two Blacks on the Commission, defendants contend, Blacks would be "over-represented," in the sense that they would exceed their percentage in the population. Although the defendants recognize that a minority group is not entitled to proportional representation, they contend that where a minority group has enjoyed persistent proportional representation, they contend that where a minority group has enjoyed persistent proportional representation, as have Blacks in Dade County, their vote dilution claim should fail.

The plaintiffs argue that many of the Blacks on the Commission were first appointed, and therefore were "safe" candidates, rather than the preferred candidates of Blacks. Defendant's reply that no evidence is before the court to support this theory. They claim the opposite is true; that the Black Commissioners, including the present one, have overwhelmingly carried the "Black District," District 3, both within the district and county-wide, in elections including other Black candidates.

According to the defendants, the Hispanic plaintiffs have likewise failed to make this showing outside the

Hispanic District (District 2), in which there has continously [sic] been a Hispanic Commissioner for the past seven years. To further support their contention that minorities have been able to elect their preferred candidates, the defendants argue that in the entire thirty year history of Metropolitan Dade County government under Home Rule, only a single Hispanic candidate – and no Black candidate – has ever prevailed in his district but lost countywide. Affidavit of David C. Leahy at 4 (Nov. 12, 1988).

VIII. Analysis

A. Applicability of the *Thornburg* Decision

There is no doubt that Dade County presents an unusual setting for a vote dilution claim. Contrary to the situation in North Carolina, where the *Thornburg* court considered the vote dilution claim against the backdrop of a state which had a clear Non Latin White majority (80 percent), and a Black minority (20 percent), and had been that way for many years, Dade County presents a dynamic, evolving community. Over the last fifteen years Dade County has experienced a tremendous influx of people from other countries and other states, and the frequency of immigration among the former group has become exceptional during the 1980's. Thus, although the plaintiffs have referred to Dade County as a tri-ethnic community, it is clear that Dade County is multi-ethnic. While the primary groups are Blacks, Hispanics, and Non Latin Whites, the Hispanic population, for example, includes not only Cubans, but people from various parts of Central and South America, and both the Hispanic and

Black communities have members from Caribbean countries. Dade County has truly become a microcosm of the Western Hemisphere, and is a uniquely situated venue for allegations that a violation of the Voting Rights Act has occurred. It is also against this unique backdrop that the defendants contend that *Thornburg* cannot apply to this case.

The defendants contend that the *Thornburg* analysis does not apply to Dade County, and that they are otherwise entitled to judgment as a matter of law because no single ethnic group constitutes a majority. Indeed, the defendants note that the plaintiffs, when taken together, comprise a majority of the population, and of the registered voters. According to the latest count of Dade County's population and voter registration, the following facts exist: Non Latin Whites comprise approximately 37 percent of the population and 48.67 percent of the registered voters; Hispanics (including Hispanics born in United States) comprise approximately 43 percent of the population and 32.96 percent of the registered voters; and Blacks comprise approximately 20 percent of the population and 18.37 percent of the registered voters of Dade County. Affidavit of David C. Leahy at 2 (March 17, 1988).

The fact that together Blacks and Hispanics account for a majority of the Dade County population, however, will not block a grant of relief in this action. In *Zimmer v. McKeithen*, 485 F.2d 1297, 1300 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carrol Parish School Board v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976), the Fifth Circuit considered a vote dilution case

brought by Black citizens of East Carroll Parish, Louisiana seeking to overturn the at-large elections used for local police juries and the school board. At the time the suit was brought, black citizens comprised 58.7 percent of the population. The *Zimmer* court followed explicit Supreme Court precedent by stating that while population is a relevant factor in an apportionment case, access to the political process is the "barometer of dilution of minority voting strength." *Id.* at 1303; *see also Whitcomb v. Chavis*, 402 U.S. 124, 149-50, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363, 379-80 (1971); *White v. Regester*, 412 U.S. 755, 765, 93 S. Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973) (affirming a district court's finding of dilution of a minority group's vote despite their comprising a numerical majority of the population of that county). The defendants are asking the court to apply an unrealistically simple per se rule to a political process and political culture that cannot be characterized ~~so neatly. Rather~~ then espouse a rule such as, "Minority of population required," or "Minority of registered voters required," this court will apply the *Thornburg* test to the instant case to determine whether the plaintiffs have met their burden of proving a violation of the Voting Rights Act.

B. Thornburg's Three Necessary Preconditions

1. Sufficiently Large and Geographically Compact.

Blacks in Dade County constitute a sufficiently large and geographically compact minority group to constitute a majority in a single member district. This court agrees with the findings of a study conducted by the Metro-

Dade County Planning Department, that the approximately 381,000 Blacks living in Dade County reside within sufficiently concentrated and large regions of Dade County to constitute a majority in a single member district. *See* METRO DADE COUNTY PLANNING DEPARTMENT, POPULATION PROJECTIONS: RACE & HISPANIC ORIGIN – DADE COUNTY, FLORIDA 1980-2000, at Tables 1 & 3, Figures 4, 6 & 7 (June 1987). The defendants do not dispute the Black plaintiffs' ability to meet this first *Thornburg* precondition.

As to the Hispanics, the facts are less clear. Yet, this court is convinced that the approximately 811,000 Hispanics in Dade County, although living in a greater range of areas than their Black counterparts, are sufficiently large and live in sufficiently concentrated areas to meet *Thornburg's* first precondition. *See Id.* at Tables 1, 3 & 4, Figures 9 & 10; METRO-DADE COUNTY PLANNING DEPARTMENT, HISPANIC PROFILE 48-52 (Dec. 1986) (stating that Hispanics live in segregated residential patterns, although to a lesser degree than Blacks).

2. Politically Cohesive

Blacks in Dade County are politically cohesive. In reviewing the data of Professor Stowers submitted by the plaintiffs, the court has carefully considered the homogenous precinct analyses of all races involving Black candidates. In all races examined, the percentage of Black voters who voted for Black candidates was consistently high. Professor Stowers demonstrated that Black voters often voted overwhelmingly in favor of Black candidates who ran against either a Non Latin White or a Hispanic.

See generally Affidavit of Professor Genie Stowers (Feb. 11, 1988).

Dade County's Hispanics, however, are not politically cohesive. As a preliminary matter, in only two of eight races involving Hispanic candidates, did the Hispanic candidate carry their own ethnic group. In the 1980 County Commission runoff between Luis Morse (Hispanic) and Beverly Phillips (Non Latin White), the percentage of Hispanics that voted for Morse reached 64 percent. Affidavit of Professor Genie Stowers at 9 (Feb 11, 1988). In the 1986 runoff for Dade County Judge between Roy Gelber (Non Latin White) and Lucretia Granda (Hispanic), the homogenous precinct analysis reveals that Granda received 65 percent of the Hispanic vote. *Id.* at 16. In all other races where Hispanics ran for office, they received very little support from Hispanic voters. *Id.* at 6, (36%); 7, Table IV (44%); 8, Table V (34%); 12, Table IX (32%); 13, Table X (24%); 15, Table XII (43%). The court's analytical and statistical conclusion that Dade County's Hispanics are not politically cohesive is strongly supported by the political reality in Dade County. As discussed at the outset of this analysis, Dade County's Hispanic population consists of a multitude of different factions. As a member of this community for thirty-five (35) years, the undersigned has come to realize that one's place of national origin, and the circumstances under which he came to the United States, affects one's political views significantly. Many people came to Dade County after the governments of their native lands, especially Cuba and Nicaragua, were experiencing turmoil and revolution, and their varied experiences influence their political outlook greatly. For instance, Dade County is home to

many people who came here as a result of a communist revolution in their homeland, and others who fled the oppressive regimes of right-wing dictators. It is widely thought that each of these experiences tends to produce a different party affiliation in the individual. Thus, the political ideology of Dade's Hispanics is incapable of being neatly labelled. It is an aggregation of many different political views.

Under *Thornburg*, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Thornburg*, 478 U.S. at 51, 106 S. Ct. at 2767, 92 L.Ed.2d at 47. The court has examined the plaintiffs' submission of data on this issue, and against the harsh realities of these statistics, derived from Professor Stower's own analyses and definitions, her conclusions as to the political cohesiveness of Dade County's Hispanics are incorrect. For example, Professor Stowers concludes from the 1986 County Commission primary election between Raymundo Barrios (Hispanic), Betty Ferguson (Black), and Barry Schreiber (Non Latin White) that "Hispanic voters gave tremendous support to Barrios." Affidavit of Professor Genie Stowers at 13 (Feb. 11, 1988). Yet, Barrios only received 24 percent (or 23,039 votes) of the Hispanic vote, a figure not surprising given only 26, 590 votes were cast for Barrios in the election. *Id.* In other words, most of the votes that Barrios received were by Hispanic voters, but he did not receive most of the Hispanic votes cast. Had Barrios truly received the overwhelming support, the "almost perfect correlation," he probably would have won the election. Consequently,

the court finds that the plaintiffs have failed to show that Hispanics are politically cohesive.

3. Non Latin White Block Voting

A. Is there a Non Latin White Block Majority?

The third precondition that the plaintiffs must meet in order to overcome the threshold inquiries set forth in *Thornburg*, is that a white majority sufficiently votes as a bloc to be almost always able to defeat a minority's preferred candidate. *Thornburg*, 478 U.S. at 51, 106 S. Ct. at 2767, 92 L.Ed.2d at 47. This prong is often referred to as the crucial element to a Section 2 claim. *See e.g., Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 499 (5th Cir. 1987). The theoretical basis for the importance of this analysis is that, given the premise that minority and majority voters typically prefer different candidates, the majority will prevail to defeat the choices of minority voters, by virtue of its numerical superiority. Thus, it is imperative that the plaintiffs demonstrate that the Non Latin White community not only vote as a bloc, but that they are a voting bloc majority. Without a majority, Non Latin White voters cannot have the power to compromise the minorities' ability to elect their preferred candidates. After a review of all relevant pleadings, the court concludes that Non Latin Whites in Dade County are not a majority of the registered voters.

According to David C. Leahy, the Supervisor of Elections of Metropolitan Dade County, Non Latin Whites comprise approximately 48.67 percent of the registered voters of Dade County, while Hispanics and Blacks

account for approximately 32.96 percent and 18.37 percent, respectively, of Dade County's registered voters. Affidavit of David C. Leahy at 2 (Mar. 17, 1988). Plaintiffs, of course, object to the use of these statistics and direct the court's attention to their submission of Leahy's deposition as proof of the correct statistics. Indeed, Leahy stated that in October, 1987, Non Latin Whites comprised 55.6 percent of the registered voters, Hispanics comprised 26.4 percent, and Blacks made up 18 percent. Deposition of David C. Leahy at 9 (Nov. 30, 1987). There is an apparent inconsistency between these records, since Non Latin Whites cannot be both a majority and part of a plurality.

Leahy specifically stated in his deposition that Hispanics born in the United States were included under the Non Latin White category. *Id.* at 4. Thus, it is the use of this rule of construction in the October, 1987 deposition figures, but not in the March, 1988 affidavit, that produces the different result for Non Latin White and Hispanic registered voters. Plaintiffs claim that the court must consider Leahy's deposition testimony to the exclusion of his affidavit. The different set of registered voter statistics represents a difference in the use of operative terms or definitions; namely, whether Hispanics born in this country should be characterized as Hispanics or Non Latin Whites. As such, the court believes Leahy's deposition and affidavit represent two legitimate schools of statistical thought. This court finds it impractical and unrealistic to adopt a brightline rule grouping Hispanics born in the United States either apart from Hispanics as a whole, or as part of the Non Latin White population.

The degree to which a person of Hispanic ancestry identifies with, and is influenced by his Hispanic culture is a variable that is beyond statistical analysis. In Dade county in particular there may be Hispanics who spend almost their entire lives in "Little Havana," and others whose lives are spent completely apart from the culture, customs and language of the Hispanic community. In many cases, it takes several generations for a person to strike a balance between his identity with his homeland and his devotion to his adopted country. Some people may never reach that balance, while other may assimilate completely and immediately. Thus, the court's resolution of the issue of Non Latin White bloc voting must turn on whether that voting is legally significant, and not whether there is a Non Latin White voting bloc majority.

B. Is There Legally Significant Non Latin White Bloc Voting in Dade County?

The question raised under this aspect of *Thornburg's* third prong, is whether Non Latin White voters voting as a bloc for a Non Latin White candidate will usually defeat a minority candidate for County Commissioner, whether he be Black or Hispanic. *See League of Untied Latin American Citizens v. Midland Independent School District*, 812 F.2d 1494, 1502 (5th Cir. 1987)

The *Thornburg* Court acknowledged that there is no simple doctrinal standard to determine legally significant racial bloc voting. *Thornburg*, 478 U.S. at 55-58, 106 S. Ct. at 2769-70, 92 L.Ed.2d at 49-51. This court has considered carefully the evidence submitted by the parties, looking particularly for a pattern of racial bloc voting which

might be probative of legally significant polarization. The *Thornburg* Court's inability to agree on the requisite proof required to prove racially polarized voting – from which racial block voting is determined – makes resolution of this issue a difficult one.

The court has carefully reviewed Professor Stowers' affidavit, submitted to support their contention that Dade County experiences legally significant racial block voting. The court concludes from this analysis that the Non Latin White voting bloc is not legally sufficient. Rather, several factors, including hostilities between the minority groups, incumbancy, name recognition, candidate fitness, etc., all contribute to the plaintiffs' alleged political woes, and thus, plaintiffs have confused "losing" votes with "diluted" votes.

It is apparent from examination of the elections involving Black candidates that the plaintiffs have failed to prove legally significant Non Latin White block voting. In most races analyzed, the Black candidates' inability to attract additional support from the Hispanics was as much a reason for their loss as their inability to do the same with Non Latin Whites. Indeed, in the races involving Black candidates, the Non Latin White voters supported the Black candidates in a percentage proportion almost equal to Hispanics. *See* Affidavit of Professor Genie Stowers at 4, 12, 14, 17, 18. In elections involving Black candidates Betty Ferguson and Leah Simms, the Black candidate lost by a very small margin. *Id.* at 12, 14, 18. Moreover, in the majority of these races, the Black candidates were able to garner the support of nearly one-third of the Hispanics and the allegedly Non Latin White bloc majority. The conclusion from such close elections,

(sometimes involving a Black challenger against an incumbent) is that Dade County does not experience legally sufficient Non Latin White bloc for purposes of Section 2 of the Voting Right Act.

Although the degree of bloc voting that rises to the level of legal significance varies from district to district, if a Non Latin White voting bloc "normally will defeat the combined strength of minority support plus white 'cross-over' votes [it] rises to of the level of legally significant bloc voting." *Thornburg*, 478 U.S. at 56, 106 S. Ct. at 2770, 92 L.Ed.2d at 50. The court has discerned, and plaintiffs admit a keen hostility in fact exists between the minority groups. Transcript of First Oral Argument at 8-9 (January 27, 1988). Professor Stowers' affidavit shows that without exception, when a Black or Hispanic candidate is running against a Non Latin White candidate, the other minority group will vote for the Non Latin White. As noted above, Black candidates lost several elections by small margins. In these elections, had there been no hostility between Blacks and Hispanics, the election of the Black over the Non Latin White would have been all but guaranteed.

Of course, the election of a few minority candidates does not itself prevent a court from finding that minority votes are being impermissibly submerged into the Non Latin White majority. But the court's analysis goes far beyond merely recognizing minority successes, and concludes that Blacks are not suffering from the effects of a legally cognizant Non Latin White block majority.

The court reaches the same conclusion as to Hispanics' claim of racial block voting. In most races analyzed, the Hispanic candidate was not able to carry

his own ethnic group. Indeed, as discussed previously, in only two of eight races analyzed did the Hispanic receive more than 50 percent of the Hispanic vote. In all other races examined, the Hispanic candidate received only about one-third the support of all ballots cast by Hispanics. These results call into question the candidates' fitness to run, incumbancy of an opponent, campaign issues, etc. Moreover, the court once again observed a hostility in fact between the minorities.

The court concludes that the plaintiffs have failed to prove the existence of a Non Latin White bloc majority that usually defeats the election of the minority's preferred candidates. That is, the court in considering the totality of circumstances involved in Dade County has been unable to find legally significant Non Latin White bloc voting sufficient to sustain the Plaintiffs' burden of proving a vote dilution claim.

IX. Conclusion

The plaintiffs in this case have failed to satisfy the threshold inquiries necessary to establish a violation of Section 2 of the Voting Rights Act. Accordingly it is hereby:

ORDERED and ADJUDGED that the defendants' motion for summary final judgment is GRANTED, and because the plaintiffs are not entitled to judgment as a matter of law, their motion for summary judgment is DENIED. Summary Final Judgment is hereby entered for the defendants and against the plaintiffs.

DONE and ORDERED at the United States District Court, Miami, Florida this 5 day of October, 1988.

/s/ Kenneth L. Ryskamp
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record